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Supreme Court, U.S.
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In The

Supreme Court of the United States

HERITAGE COAL COMPANY, LLC,
formerly Peabody Coal Company, LLC,
Petitioner,

v.

AMBROSIA LAND INVESTMENTS, LLC, formerly Wilke Window & Door Company, Inc. and ILLINOIS MINE SUBSIDENCE INSURANCE FUND,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether the Court of Appeals, in this case of first impression, exceeded its discretionary jurisdiction in reversing the District Court for reasons not advanced by any party in the District Court, or even on appeal, where resolution of the issue was not obvious, and doing so was not necessary to prevent a clear miscarriage of justice.

II. Whether the Court of Appeals erred in deciding, *sua sponte*, that mine subsidence actions are merely for the withdrawal of support, thus prompting the Court to further find, also *sua sponte*, that Petitioner was not sued for an act or omission related to construction activity, but only in its status as a landowner.

RULE 14.1(b) STATEMENT

A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

Defendant-Appellee and Petitioner: Heritage Coal Company, LLC. While the case was before the Court of Appeals, Heritage Coal Company, LLC was substituted for the originally-named defendant, Peabody Coal Company.

Plaintiffs-Appellants and Respondents:

1. Illinois Mine Subsidence Insurance Fund.

2. Ambrosia Land Investments, LLC. (During pendency of the appeal, Ambrosia Land Investments, LLC was substituted for the originally-named defendant, Wilke Window & Door Company, Inc.).*

* Subsequent to the decision of the Court of Appeals, a compromise settlement has been reached between Ambrosia Land Investments, LLC and Heritage Coal Company, LLC, although, at the time of filing this Petition, settlement documents have not yet been executed or a dismissal order entered.

RULE 29.6 DISCLOSURE

Petitioner, Heritage Coal Company, LLC, f/k/a Peabody Coal Company, LLC, is wholly owned by Patriot Coal Corporation, a publicly-held corporation.

TABLE OF CONTENTS

Questions Presented i

Rule 14.1(b) Statement ii

Rule 29.6 Disclosure iii

Table of Contents iv

Table of Authorities v

Opinions Below 1

Jurisdiction 1

Statutory Provision Involved 1

Statement of the Case 2

Reasons for Granting the Petition 5

Conclusion 18

Appendix:

Appendix A: Seventh Circuit decision (Apr. 9, 2008) 1a

Appendix B: District Court Memorandum & Order (Mar. 27, 2007) 26a

Appendix C: Seventh Circuit Order re rehearing (May 12, 2008) 44a

TABLE OF AUTHORITIES

Cases

Abril v. Com. of Virginia,
145 F.3d 182 (4th Cir. 1998) 7, 8

Alaska Pacific Salmon Co. v. Reynolds Metals Co.,
163 F.2d 643 (2nd Cir. 1947) 6

Am. Nat'l Bk. & Trust Co. v. Booth/Hansen,
186 Ill. App. 3d 865, 542 N.E.2d 925 (Ill. App. Ct. 1989) 11, 16

Commonwealth Edison Co. v. Walsh Const. Co.,
177 Ill. App. 3d 373, 532 N.E.2d 346 (Ill. App. Ct. 1988) 11, 16

Continental Ins. Co. v. Walsh Const. Co.,
171 Ill. App. 3d 135, 524 N.E.2d 1131 (Ill. App. Ct. 1988). 17

C.S. Johnson Co. v. Champaign Nat'l Bank,
126 Ill. App. 3d 508, 467 N.E.2d 363 (Ill. App. Ct. 1984) 16

Economy Folding Box Corp. v. Anchor Frozen Foods Corp.,
515 F.3d 718 (7th Cir. Jan. 25, 2008) 9

Exxon Shipping Co. v. Baker,
___ U.S. ___, 128 S. Ct. 2605, 171 L. Ed. 2d 570 (June 25, 2008) 5

First Nat'l Bk. & Trust Co. of Rockford
v. Universal Mortgage & Realty Trust,
38 Ill. App. 3d 345, 347 N.E.2d 198 (Ill. App. Ct. 1976) 17

Gafford v. General Electric Co.,
997 F.2d 150 (6th Cir. 1993) 8

Greenlaw v. United States,
___ U.S. ___, 128 S. Ct. 2559, 171 L. Ed. 2d 399 (June 23, 2008) 10

Habaker v. Town of Estes Park,
518 F.3d 1217 (10th Cir. March 14, 2008) 7

Harris v. Ryding,
5 Meeson & Welsby, 59 13

Hormel v. Helvring,
312 U.S. 552, 61 S. Ct. 719, 85 L. Ed. 1037 (1941) 6, 9

Humphries v. Brogden,
12 Queen's Bench, 743 (1850) 13

Hurst v. Scholl,
232 Ill. App. 169, 1924 WL 3482(Ill. App. Ct. 1924) 12

Illinois Mine Subsidence Ins. Fund
v. Peabody Coal Co.,
282 F. Supp. 2d 1078 (C.D. Ill. 2005) 3

In re Morris,
260 F. 3d 654 (6th Cir. 2001) 9

Kamp v. Pries,
332 Ill. App. 3d 1115, 774 N.E.2d 865 (Ill. App. Ct. 2002) 15

Krueger v. A.P. Green Refractories,
283 Ill. App. 3d 300, 699 N.E.2d 947 (Ill. App. Ct. 1996) 15

Lloyd v. Catlin Coal Co.,
210 Ill. 460, 71 N.E. 335 (Ill. 1904) . . . 11, 12, 14

Mason v. Peabody Coal Co.,
320 Ill. App. 350, 51 N.E.2d 285 (Ill. App. Ct. 1943) 13

MBA Enterprises, Inc. v. Northern Illinois Gas Co.,
307 Ill. App. 3d 285, 717 N.E.2d 849 (Ill. App. Ct. 1999) 15

Morietta v. Reese Const. Co.,
347 Ill. App. 3d 1077, 808 N.E.2d 1046 (Ill. App. Ct. 2004) 15

Morris v. Saline County Coal Co.,
211 Ill. App. 178 (Ill. App. Ct. 1911) 13

Noonan v. Pardee,
200 Pa. 474 50A. 255 (S.Ct. 1901) 14

Nuelsen v. Sorensen,
293 F.2d 454 (1961) 10

Ocasek v. City of Chicago,
275 Ill. App. 3d 628, 656 N.E.2d 44 (Ill. App. Ct. 1995) 17

Prate Installations v. Thomas,
363 Ill. App. 3d 216, 842 N.E.2d 1205 (Ill. App. Ct. 2006) 15

Prochnow v. El Paso Golf Club, Inc.,
253 Ill. App. 3d 387, 625 N.E.2d 769 (Ill. App. Ct. 1993) 16

Roosevelt v. E.I. DuPont de Nemours & Co.,
958 F.2d 416 (D.C. Cir. 1992) 9

Scottsdale Ins. Co. v. Flowers,
513 F.3d 546 (6th Cir. January 16, 2008) 9

Singleton v. Wulff,
428 U.S. 106, 96 S. Ct. 2868, 49 L. Ed. 2d 826 (1976) 6, 7, 8

Smart v. Martin,
5 Ellis & Blackburn, 30 (1858) 13

State Farm Mut. Auto. Ins. Co. v. Grace,
24 F.3d 955 (7th Cir. 1994) 15

Treece v. Southern Gem Coal Corp.,
245 Ill. App. 113, 1923 WL 3396 (Ill. App. Ct. 1923) 13

United States Nat'l Bk. of Oregon v. Indep. Ins. Agents of Am., Inc.,
508 U.S. 439, 113 S. Ct. 2173, 124 L. Ed. 2d 402 (1993) 10

United States v. Atkinson, 297 U.S. 157,
56 S. Ct. 391, 80 L. Ed. 555 (1936) 6

Wilms v. Jess,
94 Ill. 464, 1880 WL 9973 (Ill. 1880) 12, 13

Statutes

28 U.S.C. § 1254(1) 1

28 U.S.C. § 2101(c) 1

215 ILL. COMP. STAT. 5/801.1 2

215 ILL. COMP. STAT. 5/803.1 2

215 ILL. COMP. STAT. 5/803.1(c) 2

215 ILL. COMP. STAT. 5/812.1 2

215 ILL. COMP. STAT. 5/815.1(b) 2

735 ILL. COMP. STAT. 5/13-214(b) 1

Rules

Supreme Court Rule 13.3 1

Other Authorities

2 C.J.S. §§ 1, 2, 14 and 48 17

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is reported at 521 F.3d 778 (7th Cir. April 9, 2008) and is reproduced at Appendix A, 1a-25a. The Memorandum and Order of Judgment of the United States District Court for the Southern District of Illinois, dated March 27, 2007, is unofficially reported at 2007 WL 924463 and 2008 U.S. Dist. Lexis 21718, and is reproduced at Appendix B, 26a-43a.

JURISDICTION

The decision of the U.S. Court of Appeals for the Seventh Circuit sought to be reviewed was entered on April 9, 2008. This petition is timely under 28 U.S.C. § 2101(c) and Supreme Court Rule 13.3 because it is being filed within 90 days of the denial of a timely petition for rehearing on May 12, 2008. This Court has jurisdiction to review the judgment of the Court of Appeals pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

735 ILL. COMP. STAT. 5/13-214(b), commonly known as the Construction Statute of Repose:

> No action based upon tort, contract or otherwise may be brought against any person for an act or omission of such person in the design, planning, supervision, observation or management of construction, or *construction of an improvement to real property after 10 years have elapsed* from the time of such act or omission. [Emphasis added.]

STATEMENT OF THE CASE

The Illinois Mine Subsidence Insurance Fund ("Fund"), although a private agency, was established by the Illinois Legislature to enter into reinsurance agreements with Illinois property insurers, for property damage resulting from mine subsidence. 215 ILL. COMP. STAT. 5/801.1, 5/803.1, App. 3a. Once the participating insurer pays its insured for subsidence-related property losses, the Fund reimburses the insurer. 215 ILL. COMP. STAT. 5/812.1, App. 3a. The Fund obtains its monies from premiums collected by the insurers on behalf of the Fund, as well as investment income and receipt of government funds. 215 ILL. COMP. STAT. 5/803.1(c). In addition, after the Fund reimburses the property insurer itself, the Fund is subrogated to the rights of the insured and the property insurer, 215 ILL. COMP. STAT. 5/815.1(b), App. 3a, and may pursue subrogation against the mine operator, if it is still in existence.

Wilke Window & Door Company ("Wilke") sustained mine-related damage to its warehouse in Belleville, Illinois, and Wilke's insurer paid Wilke the amount of the available insurance coverage. App. 4a. After the Fund in turn reimbursed Wilke's insurer, it filed a subrogation suit against Peabody Coal Company ("Peabody"), alleging that Peabody was the operator of the coal mine under the Wilke warehouse, and that Peabody failed to provide sufficient support for the surface in connection with its mining operations. App. 4a.

In defense, Peabody asserted that the property had been undermined over 40 years earlier, and that its

underground room and pillar Mine involved construction of an improvement to real property, so that the 10-year Construction Statute of Repose barred the Fund's suit. App. 31a. Peabody also asserted that the doctrine of collateral estoppel barred the Fund's claims, because another Federal District Court in Illinois Mine Subsidence Ins. Fund v. Peabody Coal Co., 282 F. Supp. 2d 1078 (C.D. Ill. 2005) previously held that the Statute of Repose barred the Fund's suit, in a case also involving a subrogation claim by the Fund against Peabody for mine-related subsidence damage arising out of the same Mine.[1] App. 3a.

In the present case, all parties filed Motions for Summary Judgment, and the District Court granted Summary Judgment in favor of Peabody. The District Court was presented with undisputed evidence that in room and pillar mine methodology, some of the coal is removed, but large pillars are formed from the remaining coal and rock to provide permanent support for the surface of the earth. App. 27a. The design of a room and pillar mine involves consideration to the size, shape and placement of the pillars in light of the overlying strata to be permanently supported. Secondary support for the surface, such as timbers and cribbing, would have also been installed. App. 28a. Mine subsidence generally results from the failure of the pillars over time, caused by deterioration of the pillars, design or construction defects, or unforeseeable geologic conditions. App. 28a. The District Court held that the Statute of Repose applied to bar the Fund's claim, because the underground Mine involved

[1] The Court of Appeals did not address Peabody's additional defense of collateral estoppel.

construction of an improvement to real property. App. 43a.

On appeal, the Fund contended, as it did in the trial court, that an underground coal mine does not constitute an improvement to real property and, to a lesser extent, also argued that an underground mine did not involve construction within the meaning of the Statute of Repose. App. 9a. The Court of Appeals rejected the Fund's arguments, holding that the mine constituted an improvement to real property. App. 12a. Implicit in this holding was that the Mine, including the supporting pillars, also constituted construction within the meaning of the Statute of Repose and, indeed, the Court's opinion contains repeated references to the construction of the Mine, including the formation of pillars for the purpose of supporting the surface. App. 2a, 12a.

Nevertheless, the Court of Appeals reversed the trial court. In doing so, the Court took it upon itself to declare that the nature of plaintiff's claims had been mischaracterized from the beginning. App. 16a. The Court decided, *sua sponte*, that Peabody was not sued for construction-related activity, but only in its capacity as a landowner. App. 15a, 18a. Neither of these points had been advanced by appellants, either in the District Court or even on appeal. More importantly, the Court of Appeals made these findings, because it concluded that mine subsidence claims are "merely actions for the withdrawal of subjacent support." App. 14a. This critical reason, which formed the basis of the Court's decision, had also not been presented by any party, either in the trial court or on appeal. Furthermore, this conclusion constitutes a

major shift in mine subsidence law, and was made without the benefit of any input from the parties.

With respect, petitioner submits that each of these three determinations, all first articulated by the Court of Appeals itself rather than any party, were errors of law, and inconsistent with the undisputed facts on which the District Court had entered Judgment.

REASONS FOR GRANTING THE PETITION

I.

This Petition calls into question the fundamental role of the Federal courts of appeal as neutral arbiters, and not as inquisitors or advocates.

In this case involving an issue of first impression, the lower court's reversal of the District Court for its own reasons, not advanced by the parties, appears to be virtually unprecedented, particularly where resolution of the issue was not obvious, and reversal was not necessary to prevent a clear miscarriage of justice.

This Court has repeatedly emphasized that, as a rule of practice, a court of appeals should not consider matters not passed upon below, except in extraordinary circumstances. However, this Court has also avoided stating a bright line test to contain an appellate court's discretion to consider an issue or argument not raised in the trial court. Exxon Shipping Co. v. Baker, ___ U.S. ___, 128 S. Ct. 2605, 171 L. Ed. 2d 570 (June 25, 2008). Petitioner does not ask this Court to deviate from that position and now declare a

hard and fast rule. However, it does not appear that this Court has previously addressed the circumstances under which a court of appeals may conjure up its own reasons for reversing the trial court, which have not been advanced either in the trial court or even on appeal, without allowing the parties any chance to argue or brief the issue. Your petitioner submits that a court of appeals should only decide a case on its own reasons where the error is obvious and the resolution is beyond any reasonable doubt, and when necessary to prevent a miscarriage of justice. An issue of first impression in the appellate court, or an area where the law is not absolutely certain, should not be an appropriate arena for a court to exercise such discretion. To do so results in the utmost surprise to the parties by the decision, on issues where there has been no opportunity for argument or response.

This Court has recognized that it may be appropriate to consider argument raised for the first time at least on appeal "where proper resolution is beyond any doubt or where injustice might otherwise result." Singleton v. Wulff, 428 U.S. 106, 121, 96 S. Ct. 2868, 2877 49 L. Ed. 2d 826, 837 (1976). A court may do so to avoid a "plain miscarriage of justice," Hormel v. Helvring, 312 U.S. 552, 558, 61 S. Ct. 719, 722, 85 L. Ed. 1037, 1042 (1941), or where the error of the district court is "egregious," Alaska Pacific Salmon Co. v. Reynolds Metals Co., 163 F.2d 643, 659 (2nd Cir. 1947), or where the errors are "obvious, or if they otherwise seriously affect the fairness, integrity, or public reputation of judicial proceedings." United States v. Atkinson, 297 U.S. 157, 160, 56 S. Ct. 391, 392, 80 L. Ed. 555, 557 (1936). Clearly, none of those exceptions apply here, even if the reasons on which the lower

court relied had been advanced on appeal. See discussion of the substantive issue in Part II of this Petition.

More importantly, this Court has declared, and with good reason, that a court of appeals should not consider arguments first advanced on appeal where the issue is one of first impression:

> "The issue resolved by the Court of Appeals has never been passed upon by any decision of this Court. That being so, injustice was more likely caused than avoided by deciding the issue without petitioner's having had the opportunity to be heard."

Singleton v. Wulff, 428 U.S. 106, 121, 96 S. Ct. 2868, 2877, 49 L. Ed 2d 826, 837 (1976).

Thus, in Habaker v. Town of Estes Park, 518 F.3d 1217, 1228 (10th Cir. March 14, 2008) the Court held that a case of "first impression" is not the kind of case in which the Court of Appeals may permissibly pass upon issues raised on appeal but not in the district court.

In Abril v. Com. of Virginia, 145 F.3d 182, 185 (4th Cir. 1998), the Court recognized that its discretion to take up and resolve questions for the first time on appeal is "not unbounded," and added that:

> ". . . one of its surest boundaries is that imposed by requirements of fairness to affected litigants. Here, it would be patently unjust to decide this appeal against the Commonwealth on the basis

> of an issue – particularly one this novel – on which it had no opportunity to be heard." [citing Singleton v. Wulff, Id. at 121, 2877, 837] Accordingly, we may not properly consider it as a matter of discretion."

In the present case, the issue of the applicability of the Construction Statute of Repose to an underground mine had never been addressed by any Federal or state court of appeals. Nevertheless, the lower court devised its own reasons for reversing the District Court, without the opportunity for the losing party to be heard.

Understandably, it is difficult to find authoritative guidance from this Court or any other court addressing the scope of an appellate court's discretion where the matter was not even raised on appeal by any party. However, surely the court of review's discretion should be even more restrained, because in such a case, there is danger that the court becomes even more an inquisitor and advocate. In Abril v. Com. of Virginia, 145 F.3d at 185, the dissenting judge identified a reason for reversing the district court which had not been presented on appeal, but the Majority stated that "under the most fundamental principles constraining an appellate review, it is not before us." In Gafford v. General Electric Co., 997 F.2d 150, 167 (6th Cir. 1993) the Court of Appeals came upon an error "by happenstance," but concluded it would overstep its bounds to consider taking any action on this finding of error. "A litigant has an obligation to spell out its arguments squarely and distinctly, or else forever hold its peace." Id. at 167.

While there is good reason to avoid drawing clear boundaries to a court of appeal's discretionary jurisdiction, the absence of any specific guidance provides fertile ground for inconsistency in the lower courts. For example, while this Court and other courts have maintained that appellate discretion does not extend to cases of first impression (e.g. Hormel, 312 U.S. 552, 61 S. Ct. 719, 85 L. Ed. 2d 1037; Scottsdale Ins. Co. v. Flowers, 513 F.3d 546 (6th Cir. January 16, 2008)), other courts have held that cases raising novel issues are appropriate matters for the exercise of that discretion. Roosevelt v. E.I. DuPont de Nemours & Co., 958 F.2d 416 (D.C. Cir. 1992). In re Morris, 260 F.3d 654 (6th Cir. 2001). As further example, the lower court in this case justified its action on the grounds that it could decide the merits of legal issues which were not addressed by the trial court when the facts on which those conclusions are based are not in dispute. App. 17a. Yet, in the very same Term, the same Court stated that "it is not the court's responsibility to research the law and construct the parties' arguments for them." Economy Folding Box Corp. v. Anchor Frozen Foods Corp., 515 F.3d 718, 721 (7th Cir. Jan. 25, 2008). However, that is exactly what that Court did here.

There certainly may be exceptional cases where a court of appeals must extend its inquiry beyond the legal theories advanced by the parties, to protect the integrity of the judicial system. However, the activism of the lower court here creates its own kind of judicial folly, unnecessarily undermining the adversarial process which is at the heart of American jurisprudence, disrespecting the role of the trial court, ignoring the efforts of able counsel on all sides, and

depriving the losing party of the opportunity to be heard.[2]

This Court very recently stated, in Greenlaw v. United States, ___ U.S. ___, 128 S. Ct. 2559, 2564, 171 L. Ed. 2d 399, 408 (June 23, 2008):

> ". . . we rely on the parties to frame the issues for decision and assign the courts the role of neutral arbiter of matters the parties present . . . As a rule '[our] adversary system is designed around the premise that parties know what is best for them, and are responsible for advancing the facts and arguments entitling them to relief.'" [citations omitted]

This Court should once again be guided by these observations, as they apply with even greater force when the basis of the Court of Appeals' decision was not even presented on appeal.

II.

Notwithstanding the Court of Appeals' acknowledgement that the underground Mine

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[2] Even if the lower court felt it could not limit its decision-making to the arguments and authorities advanced by the parties, it could have noted the existence of the un-argued question and remanded to the trial court, because this makes the decision on the matter one reflecting the consideration of the trial court and counsel in the case. e.g. Nuelsen v. Sorensen, 293 F.2d 454, 462 (1961). At the very least, the Court could have ordered supplemental briefing to give the parties opportunity to address the un-argued issue. e.g. United States Nat'l Bk. of Oregon v. Indep. Ins. Agents of Am., Inc., 508 U.S. 439, 113 S. Ct. 2173, 124 L. Ed. 2d 402 (1993).

constituted construction of an improvement to real property, the Court held that the Construction Statute of Repose did not apply, deciding, *sua sponte*, that the suit did not arise out of "construction-related activity," because "subsidence claims are merely actions for withdrawal of subjacent support." App. 14a, 15a. The Court was mistaken.[3] Even Lloyd v. Catlin Coal Co., 210 Ill. 460, 71 N.E. 335 (Ill. 1904), on which the Court relied, did not so hold. Rather, liability rests on the coal operator when the owner of the surface estate is "deprived of the necessary support." Id. at 468. This is not just a semantic difference.

The mine operator has the right, as granted to it by the surface owner, to withdraw support consisting of the coal removed. However, the operator is duty-bound to leave or provide sufficient support for the surface. If the operator fails to do so (even in the absence of fault), and subsidence causing damage results, these facts give rise to, and form the basis of, a subsidence claim.[4]

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[3] Even if the lower court had been correct, it should not have made any difference, because the Statute applies to the withdrawal of subjacent support in connection with the construction of an improvement to real property. See the discussion of Am. Nat'l Bk. & Trust Co. v. Booth/Hansen, 186 Ill. App. 3d 865, 542 N.E.2d 925 (Ill. App. Ct. 1989), Commonwealth Edison Co. v. Walsh Const. Co., 177 Ill. App. 3d 373, 532 N.E.2d 346 (Ill. App. Ct. 1988) and other authorities at p. 16, *infra*.

[4] To put it another way, the void created by the rightful removal of coal does not cause subsidence. Indeed, far more often than not, subsidence does not occur as a result of undermining, even many years after the mining has been completed. The removal of coal, and the accompanying withdrawal of support, may create the potential for subsidence, but it is the failure of the pillars and

Although subsidence liability is strict liability, as in all tort cases, there must still be a wrong. The withdrawal of support in the form of coal removed is not wrongful; the failure to provide or leave sufficient support is. That is the breach of duty, and the nature of a subsidence claim.

Thus, in Lloyd v. Catlin Coal Co. itself, 210 Ill. at 469, the surface owner sued the mine company for subsidence, not for withdrawing support but because the defendant did not "leave sufficient support," with the Court holding: "The mine operator is entitled to all of the minerals [under the land] save so much as is necessary to be left in place for proper support."

This has consistently been the law of Illinois, commencing with the seminal mine subsidence case of Wilms v. Jess, 94 Ill. 464, 1880 WL 9973, at 2 (Ill. 1880) in which the Supreme Court held that the "owner of the minerals cannot remove them without *leaving sufficient support to maintain the surface in its natural state.*" (emphasis added). *See also* Hurst v. Scholl, 232 Ill. App. 169, 1924 WL 3482, at 5 (Ill. App. Ct.-1924): "The *gist* of the [subsidence] action is the removal of coal "without leaving sufficient support for the surface. The owner of the minerals cannot remove them without leaving sufficient support for the surface."; Morris v. Saline County Coal Co., 211 Ill. App. 178 (Ill. App. Ct. 1911): ". . . the surface owner . . . had the right to assume the coal would be mined and removed in a lawful manner and *that sufficient coal or supports would be left to support the surface.*"

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other support provided which causes the subsidence. That was the undisputed evidence in the case. App. 28a.

(emphasis added); Mason v. Peabody Coal Co., 320 Ill. App. 350, 351, 51 N.E.2d 285, 286 (Ill. App. Ct. 1943): the surface owner sued the mine operator based upon its breach of duty "to leave sufficient *ribs, pillars and supports* to prevent the superincumbent surface from sinking or subsiding." (emphasis added). In Treece v. Southern Gem Coal Corp., 245 Ill. App. 113, 1923 WL 3396 (Ill. App. Ct. 1923) the notion that a subsidence action arises at the time of removal of subjacent support was expressly rejected. "Some actual mischief" still must be done (1923 WL 3396, at 3), so that the action does not arise until the subsidence occurs. Id. at 4.

These fundamental expressions of the nature of a subsidence action date back to English common law. In Wilms v. Jess, Id. 1880 WL 9973 at 2, the Illinois Supreme Court drew its support from these authorities: Smart v. Martin, 5 Ellis & Blackburn, 30, 45 (1853): "The owner of the surface is entitled to support from the subjacent strata; and if the owner of the material works them it is his duty to *leave sufficient support for the surface* in its natural state." (emphasis added); Humphries v. Brogden, 12 Queen's Bench, 743 (1850) where defendant had removed coal under plaintiff's lands "without leaving any *sufficient pillars* to support the surface," (emphasis added), and Harris v. Ryding, 5 Meeson & Welsby, 59, 60 where Baron Parke remarked: "I do not mean to say that all the coal does not belong to defendants, but they cannot get it without leaving sufficient support." *See also* Noonan v. Pardee, 200 Pa. 474, 483, 50 A. 255, 256 (S. Ct. 1901) (cited with favor in Lloyd v. Catlin Coal Co., Id., 210 Ill. at 468): "When the coal was removed *without leaving sufficient pillars, or without supplying*

sufficient artificial props, was the time when the subjacent owner failed in an absolute duty he owed to his neighbor above." (emphasis added).

Thus, in determining whether the action here arose out of construction-related activities, the focus is not just on the support withdrawn by the rightful removal of coal, but on the adequacy of the support provided for the surface. That being so, this lawsuit necessarily arose out of construction-related activity, as that is the very nature of room and pillar mine design and construction, including artificial support for the surface in the formation of pillars from the coal and rock not removed, as well as the installation of timbers and cribbing for additional surface support. App. 27a, 28a. The failure of that support is the very "act or omission" in the construction of an improvement to real property, which forms the basis of the subsidence action, and which triggers application of the Construction Statute of Repose.

That is not only the law, it was also the undisputed evidence that it is the failure of the pillars which causes subsidence. There was no evidence, expert testimony or otherwise, that subsidence is caused by the withdrawal of support in the form of the coal removed.

All of this being so, it necessarily follows, both legally and factually, that the nature of this action for failure to provide adequate support does involve construction-related activity, and is not simply a suit against the mine operator in its capacity as landowner. The authorities relied upon by the court below are inapposite. e.g. Prate Installations v. Thomas, 363 Ill.

App. 3d 216, 842 N.E.2d 1205 (Ill. App. Ct. 2006): an action for failure to pay a bill for plaintiff's removal of a roof and other work at defendant's residence; such a collection suit obviously did not involve construction-related activity, so that the Construction Statute did not apply; Krueger v. A.P. Green Refractories, 283 Ill. App. 3d 300, 699 N.E.2d 947 (Ill. App. Ct. 1996) and State Farm Mut. Auto. Ins. Co. v. Grace, 24 F.3d 955, 957 (7th Cir. 1994): both holding that while the Statute of Repose may apply to the installation of asbestos, the mere sale of asbestos product is not construction-related activity; Morietta v. Reese Const. Co., 347 Ill. App. 3d 1077, 1081, 808 N.E.2d 1046, 1050 (Ill. App. Ct. 2004): repaving a road was not construction of an improvement, but merely repair and replacement of an existing improvement, so that the Construction Statute did not apply; MBA Enterprises, Inc. v. Northern Illinois Gas Co., 307 Ill. App. 3d 285, 717 N.E.2d 849 (Ill. App. Ct. 1999): the Construction Statute actually applied to claims arising from the installation of a gas piping system, but not those claims that the utility used and sold gas through the system because, in that latter situation, defendant was not engaged in construction-related activity; Kamp v. Pries, 332 Ill. App. 3d 1115, 774 N.E.2d 865 (Ill. App. Ct. 2002): in a suit for injuries when an apartment deck collapsed, plaintiff's claims of inadequate construction were actually dismissed under the Construction Statute, and plaintiff was permitted to sue defendant only in its status as a landlord, for allowing an unsafe deck to be used; C.S. Johnson Co. v. Champaign Nat'l Bank, 126 Ill. App. 3d 508, 467 N.E.2d 363, 366 (Ill. App. Ct. 1984): Construction Statute did not apply, but that was because defendants presented no evidence or argument that they, in fact,

participated in the construction of the property at issue, and defendants were only sued in their status as landowners; Prochnow v. El Paso Golf Club, Inc., 253 Ill. App. 3d 387, 625 N.E.2d 769 (Ill. App. Ct. 1993): the complaint's allegations of construction were actually dismissed, and plaintiff did not charge that defendant-landowner was responsible for the construction.

The lower court's decision effectively carves an exception, excluding underground mines from the Statute of Repose, where no such exception is statutorily expressed, and which conflicts with other Illinois decisions. *See* Am. Nat'l Bk. & Trust Co. v. Booth/Hansen, 186 Ill. App. 3d 865, 542 N.E.2d 925 (Ill. App. Ct. 1989): in connection with excavation for the construction of a subway system, defendant removed earth supporting plaintiff's building, causing damage; *Held* the Construction Statute applied. In Commonwealth Edison Co. v. Walsh Const. Co., 177 Ill. App. 3d 373, 532 N.E.2d 346 (Ill. App. Ct. 1988), in creating an underground tunnel as part of a sewer project, defendant excavated the "earth which was underneath and the under support of" plaintiff's transformer vault. Just as in the instant case, plaintiff alleged that the transformer vault was damaged as a result of defendant's failure to provide adequate support for the surface. The Court held that the Statute applied. Id. at 379. To the same effect, *see* Continental Ins. Co. v. Walsh Const. Co., 171 Ill. App. 3d 135, 137, 524 N.E.2d 1131, 1133 (Ill. App. Ct. 1988). There is no reason in law or fact to say that the present case is any different, or if there is, this case should not hang from a thread so thin.

The legal duty to provide subjacent and lateral support to prevent subsidence, is not limited to underground mines, but is a common law duty generally owed to the surface estate. 2 C.J.S. §§ 1, 2, 14 and 48; First Nat'l Bk. & Trust Co. of Rockford v. Universal Mortgage & Realty Trust, 38 Ill. App. 3d 345, 347 N.E.2d 198 (Ill. App. Ct. 1976). The lower court's holding would appear to render the Statute of Repose inapplicable to other underground excavation and removal of earth, including tunnels, subways, parking garages, underground utilities, basements and lakes, which result in damage to the surface and surface structures. Such a result is contrary to the language and purpose of the Statute, existing Illinois case law, and the requirement that the Statute must be broadly construed in order to fulfill the objectives for which it was intended. Ocasek v. City of Chicago, 275 Ill. App. 3d 628, 633, 656 N.E.2d 44, 48 (Ill. App. Ct. 1995).

CONCLUSION

Petitioner respectfully submits that unintended error is more likely to occur when an appellate court's decision is not the product of the adversarial process. The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 07-1945

[Filed April 9, 2008]

AMBROSIA LAND INVESTMENTS, LLC,
Plaintiff-Appellant,

and

ILLINOIS MINE SUBSIDENCE INSURANCE FUND,
Intervening Plaintiff-Appellant,

v.

PEABODY COAL COMPANY,
Defendant-Appellee.

Appeal from the United States District Court
for the Southern District of Illinois.
No. 05 C 371—**David R. Herndon**, *Chief Judge*.

ARGUED OCTOBER 23, 2007—
DECIDED APRIL 9, 2008

Before BAUER, CUDAHY and SYKES, *Circuit Judges*.

BAUER, *Circuit Judge*. Plaintiff-Appellant Ambrosia Land Investments, LLC[1] ("Ambrosia") and Intervening Plaintiff-Appellant Illinois Mine Subsidence Insurance Fund ("the Fund") (collectively "the Plaintiffs") appeal the district court's conclusion that their claims are barred by the Illinois Construction Statute of Repose, 735 ILCS 5/13-214(b). For the following reasons, we reverse.

I. Background

In 1995, Ambrosia constructed a warehouse on its property in St. Clair County, Illinois, which happened to be located above St. Ellen Mine ("the Mine"), an underground coal mine originally built in the early 1900s that spans over 3,800 acres. Peabody, who had acquired the rights to the Mine in 1957 from Perry Coal Company, operated the Mine until 1960, when it closed the Mine. The Mine was designed using a widely-recognized method of mining called the "room and pillar," in which shafts are driven down into the earth, creating passageways for the movement of coal and personnel. Coal is removed, leaving empty areas or "rooms." "Pillars" are then formed from the remaining coal and rock, providing structure and support for the rooms and for the surface above the mine during the time the mine is in operation and

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[1] Ambrosia Land Investments, LLC was substituted as the plaintiff-appellant for Wilke Window & Door Company, Inc., on September 5, 2007.

permanently thereafter. While pillars are usually reinforced with secondary support by installing bolts or timber, because of the passage of time, the exact type of secondary support used in the Mine is unknown. As time passes, the surface above a mine sinks or shifts as a result of mine subsidence, which is the deterioration of the pillars, design defects, or geological occurrences.

In order to insure that property owners have the financial resources to repair damage to property caused by mine subsidence, the Illinois legislature established the Fund to provide reinsurance for mine subsidence losses to Illinois property. 215 ILCS 5/801.1, 5/803.1. The Fund is required to enter into reinsurance agreements with all Illinois property insurers, whereby premiums are collected by the insurer and paid to the Fund under the agreement. Once the insurer receives a claim of potential mine subsidence from the property owner, it forwards the claim to the Fund. The Fund hires geologists to investigate the claim and eventually determine whether the damage was caused by mine subsidence or other earth movement. If the Fund determines that the damage was caused by mine subsidence, it notifies the insurer, who in turn fulfills its contractual duties by paying the insured for the losses claimed, and then requests reinsurance reimbursement from the Fund. The Fund reimburses the property insurer for the amount it paid to its insured, and the Fund is then subrogated to the rights of both the insured and the property insurer. *See* 215 ILCS 5/815.1(b).

In late November 2000, forty years after Peabody closed the Mine, Ambrosia noticed that its warehouse

had structural damage. Suspecting that the damage was the result of mine subsidence, Ambrosia filed a claim with its insurance company, Federated Mutual, on its insurance policy for mine subsidence loss coverage. Federated, in turn, forwarded the claim to the Fund. The Fund received Federated's claim and hired geologist Stephen Danner to investigate. On March 14, 2002, Danner concluded that mine subsidence from the Mine caused damage to the warehouse on the Ambrosia property. Federated paid Ambrosia the maximum amount of its mine subsidence loss coverage policy—$350,000—and then requested reimbursement of that amount from the Fund. The Fund paid Federated the full amount of the claim.

On April 21, 2005, Ambrosia filed suit against Peabody in Illinois state court, claiming that it sustained actual damages that substantially exceeded the $350,000 amount that it received from Federated. The complaint alleged that (1) Peabody, as owner and operator of the Mine, was negligent in failing to provide adequate support for the surface above the Mine, and (2) Peabody violated its duty to prevent mine subsidence under the Illinois Surface Coal Mining Land Conservation and Reclamation Act ("SCMLCRA"), 225 ILCS 720/4.02. Peabody removed the case to federal court on the basis of diversity jurisdiction. In October, 2005, the Fund moved to intervene as an additional plaintiff under 215 ILCS 5/815.1, claiming Peabody was strictly liable for failing to provide sufficient support for the surface of the Ambrosia property, and asserting its subrogation rights to recover the $350,000 it paid pursuant to its reinsurance agreement with Federated in 2002.

Peabody moved for summary judgment, asserting in part that Plaintiffs's sought to hold Peabody liable for their acts or omissions that occurred over forty-five years ago, and that a coal mine constituted an improvement to real property, thus Plaintiffs's claims were barred under the Illinois Construction Statute of Repose, 735 ILCS 5/13-214(b).

Plaintiffs also filed a summary judgment motion, claiming that it was undisputed that the warehouse was undermined by Peabody during the period it operated the Mine (1957 to 1960), and because a surface owner had an absolute right to subjacent support, Peabody was strictly liable for failing to provide subjacent support under Illinois law. Plaintiffs also argued that § 13-214(b) did not bar their claims because the removal of coal was not construction of an "improvement to real property."

On March 27, 2007, the district court granted Peabody's motion for summary judgment, finding that § 13-214(b) barred Plaintiffs's claims because a coal mine constituted "construction of an improvement to real property." Accordingly, the district court denied Plaintiffs's motion for summary judgment as moot. This timely appeal followed.

II. Discussion

We begin by determining whether the district court erred in granting summary judgment in favor of Peabody. We review a district court's grant of summary judgment *de novo*, drawing all inferences in favor of the nonmoving parties. *Breneisen v. Motorola, Inc.*, 512 F.3d 972, 977 (7th Cir. 2008). Summary

judgment is appropriate where there are no genuine issues of material fact and the moving party (Peabody) is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c). Our task is to determine whether, as a matter of law based on undisputed facts, the Illinois statute of repose bars the Plaintiffs's claims. *Hausman v. Monarch Mach. Tool Co.*, 997 F.2d 351, 353 (7th Cir. 1993).

The Illinois Construction Statute of Repose, entitled "Construction—Design management and supervision," provides that:

> No action based upon tort, contract or otherwise may be brought against any person for an act or omission of such person in the design, planning, supervision, observation or management of construction, or construction of an improvement to real property after 10 years have elapsed from the time of such act or omission.[2]

735 ILCS 5/13-214(b). Application of § 13-214(b) involves a two-step analysis: (1) whether a coal mine is an "improvement to real property," and (2) whether Peabody engaged in activities that fall within the ambit of § 13-214(b). *Garrison v. Gould,* 36 F.3d 588, 591 (7th Cir. 1994).

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[2] There is no dispute that ten years had passed since the conduct upon which Peabody bases its statute of repose defense occurred.

A. Improvement to Real Property

Whether a coal mine constitutes an "improvement" under the Illinois Statute of Repose is a question of law, although resolution of the question is grounded in fact. *Garner v. Kinnear Mfg. Co.*, 37 F.3d 263, 266 (7th Cir. 1994); *St. Louis v. Rockwell Graphic Sys. Inc.*, 153 Ill.2d 1, 178 Ill.Dec. 761, 605 N.E.2d 555 (1992). Because we sit in diversity, we apply Illinois substantive law. *Ass'n Benefit Servs., Inc. v. Caremark RX, Inc.*, 493 F.3d 841, 849 (7th Cir. 2007). We use a common sense approach, focusing on the ordinary meaning of the statutory language when interpreting the phrase "improvement to real property." *Hilliard v. Lummus Co.*, 834 F.2d 1352, 1355 (7th Cir. 1987).

Although Illinois courts have not yet addressed the issue of whether a coal mine constitutes an "improvement to real property" under § 13-214(b), Illinois case law provides us with strong guidance. In *St. Louis v. Rockwell Graphic Systems Inc.*, the Illinois Supreme Court defined "improvement" as "a valuable addition made to property (usually real estate) or an amelioration in its condition, amounting to more than mere repairs or replacement, costing labor or capital, and intended to enhance its value, beauty, or utility or to adapt it for new or further purposes."178 Ill.Dec. 761, 605 N.E.2d at 556 (citing Black Law's Dictionary 682 (5th ed. 1979)); *see also Hausman,* 997 F.2d at 354 (discussing "improvement to real property" as defined in St. Louis). Although the *St. Louis* court held that there was an insufficient factual record to determine whether a printing press was "an improvement to real property," it set forth "relevant criteria" for determining what constitutes an "improvement to real

property," such as whether the addition was meant to be permanent or temporary, whether it became an integral component of the overall system, whether the value of the property was increased, and whether the use of the property was enhanced. 178 Ill.Dec. 761, 605 N.E.2d at 556; *see also State Farm Mut. Auto. Ins. Co. v. W.R. Grace & Co.*, 24 F.3d 955, 958 (7th Cir. 1994); *Morietta v. Reese Constr. Co.*,347 Ill.App.3d 1077, 283 Ill.Dec. 758, 808 N.E.2d 1046, 1050 (2004). The application of § 13-214(b) should focus on the entire construction project and not merely on a single component of the system. *Garrison,* 36 F.3d at 592.

This Court and Illinois courts have addressed whether various products constitute "improvements" under § 13-214 in actions involving personal injury. *See id.* (electrical switch installed as part of electrical switching station is an improvement); *Garner,* 37 F.3d at 267-68 (overhead garage door system was an improvement); *Hausman,* 997 F.2d at 354-55 (anneal line for metal coils is an improvement); *Herriott v. Allied Signal Inc.*, 998 F.2d 487, 490 (7th Cir. 1993) (larry-cars used to transfer coal are improvements); *Hilliard,* 834 F.2d at 1355-56 (screw conveyor is an improvement); *Morietta,* 283 Ill.Dec. 758, 808 N.E.2d at 1050 (removal and repavement of an existing road is not an improvement); *Billman v. Crown-Trygg Corp.*, 205 Ill.App.3d 916, 150 Ill.Dec. 776, 563 N.E.2d 903, 907 (1990) (construction work at a traffic intersection is an improvement).

Illinois courts have also addressed what constitutes "construction of an improvement to real property" under § 13-214 in actions involving damage to real property. *See Bank of Ravenswood v. City of Chicago,*

307 Ill.App.3d 161, 240 Ill.Dec. 385, 717 N.E.2d 478, 483 (1999) (a subway system is not an improvement); *Zimmer v. Vill. of Willowbrook,* 242 Ill.App.3d 437, 182 Ill.Dec. 840, 610 N.E.2d 709, 716 (1993) (a pond and culvert is an improvement); *Cont'l Ins. Co. v. Walsh Constr. Co. of Illinois,* 171 Ill.App.3d 135, 121 Ill.Dec. 83, 524 N.E.2d 1131, 1135 (1988) (underground sewer system is an improvement).

In a case involving the same mine we discuss here, a federal district court held that a coal mine is an improvement to real property under Illinois law. *Illinois Mine Subsidence Ins. Fund v. Peabody Coal Co.,* 383 F.Supp.2d 1078, 1096 (C.D.Ill.2005). There, the Fund brought suit as a subrogee of multiple insurance companies (Federated was not one of those companies), and sought damages from Peabody for reinsurance reimbursements it paid for mine subsidence damage claims caused by the Mine. In granting Peabody's motion for summary judgment, the district court found that a "room and pillar" coal mine was an "improvement to real property," and held that the Fund's claims were barred by § 13-214(b). *Id.* at 1096-97.

On this appeal, we address Plaintiffs's arguments that previous case law dictates that any underground activity that benefits the surface property is not an improvement under § 13-214, and under *Bank of Ravenswood v. City of Chicago,* 307 Ill.App.3d 161, 240 Ill.Dec. 385, 717 N.E.2d 478 (1999), a coal mine is not an improvement because it does not have any relation to the use or enjoyment of the real property located above it.

Plaintiffs argue that any activity, above or below ground, which involves an addition that benefits the surface property, is an "improvement" under § 13-214, and in contrast, any underground activity that does not benefit the surface property is not an "improvement" and the statute of repose does not apply. We find this argument to be without merit. Nothing in the statute of repose indicates that the Illinois legislature intended to distinguish between above-ground activities and below-ground activities in relation to improvements to real property. Moreover, Plaintiffs interject a new "definition" of improvement to real property—whether or not the underground construction "benefits the surface property," one that has no support under Illinois law.

Plaintiffs's reliance on *Ravenswood* is unavailing. In *Ravenswood,* an Illinois appellate court analyzed whether the construction of a subway system was an improvement to real property under § 13-214. Using the relevant criteria in *St. Louis* as a guide, the court focused on whether the construction of the subway system is an integral component of the overall system, and found that a subway system is not an integral part of the function of the residential townhomes and does not enhance the overall value. The court further held that the subway system, unlike a sewer system or construction work on a traffic intersection, does not have any actual relation to the use or enjoyment of the real property located above it. 240 Ill.Dec. 385, 717 N.E.2d at 483. Plaintiffs therefore argue that while the underground coal mine may have enhanced the ground underneath the Mine, it did not benefit the surface property of the Mine because the Mine has no actual

relation to the use or enjoyment of the real property located above it.

Peabody argues that Plaintiffs's reliance on *Ravenswood* is misguided, maintaining that this "renegade" decision is the only Illinois case that suggests that underground construction must relate to the use and enjoyment of the surface property, and that the district court, as well as the court in *Illinois Mine Subsidence Insurance Fund,* 383 F.Supp.2d at 1096-97, found that *Ravenswood* offers no authoritative support for the addition of this requirement of "relation to the use and enjoyment" of the surface property. We tend to agree—the *Ravenswood* analysis of an improvement to real property has not been interpreted by any other Illinois appellate court, therefore we are inclined to follow the vast majority of other Illinois courts' interpretations of what constitutes "improvement" to real property under § 13-214.

Peabody also points to a factually-similar Illinois decision that supports a liberal interpretation of the statute of repose. In *Continental Insurance Co. v. Walsh Construction Co. of Illinois*, defendants excavated the earth to construct a sewer system, which ultimately caused damage to the plaintiffs's building above the surface of the construction. In holding that the creation and the construction of a sophisticated sewer distribution system constitutes an "improvement to real property" under § 13-214, the court found that the construction was an addition, rather then a repair and replacement, which substantially enhanced the value of the property. 121 Ill.Dec. 83, 524 N.E.2d at 1135.

After a review of Illinois law within the context of improvements to real property under § 13-214, we find that a coal mine is an improvement to real property under § 13-214(b). The Mine, particularly the pillars, was intended to be permanent support for the surface above the Mine. There is no doubt that a coal mine is a valuable addition to the real property, hiking up the real estate value of the property and awarding the owners of the property with mineral rights. At the time of the construction and operation of the Mine, it made the property more valuable than it would have been without a mine underneath it. That the Mine is more than a repair or replacement is beyond dispute—it is an addition to the property which did not previously exist. Further, the Mine cost labor and capital to construct, and was constructed to adapt the property for a further purpose—coal mining. We therefore find that a coal mine constitutes an improvement to real property for statute of repose purposes.

B. Activities Protected by the Statute

Our next inquiry is whether Peabody falls within the protected class of activities under § 13-214(b). The first clause of the statute places the protected activities in a certain context: "No action based upon tort ... may be brought against any person for an act or omission of such a person in the design, planning, supervision, observation, or management of *construction.*" § 13-214(b) (emphasis added); *see Garrison,* 36 F.3d at 592. The concluding phrase, "of construction," modifies each of the enumerated activities and not merely the final one. *Garrison,* 36 F.3d at 592. The statute of repose was originally

enacted to protect "the architect, the engineer, the contractor, anyone who is involved in the planning, supervision, operation or management of construction, or the construction of the improvement to real property." 81st Ill. Gen. Assem., House Proceedings, May 25, 1979, at 31. It was to provide relief for "professionals who are trying to exercise their sound judgment" in the design and construction of improvements to real property. *Id.* at 35.

The Illinois Supreme Court invalidated the original version of the statute as "special legislation," because it excluded from its protection owners or occupiers of the property on which the building was being built or the improvement was being made. *State Farm,* 24 F.3d at 957 (citing *Skinner v. Anderson,* 38 Ill.2d 455, 231 N.E.2d 588 (1967)). The statute was amended by the Illinois legislature to eliminate the exclusion, and the revised statute was upheld in *People ex. rel. Skinner v. Hellmuth, Obata & Kassabaum, Inc.,* 114 Ill.2d 252, 261, 102 Ill.Dec. 412, 500 N.E.2d 34 (1986), where the court found that § 13-214 protects anyone who engages in the enumerated activities, regardless of their status. *Id.; see also Hausman,* 997 F.2d at 354 (under § 13-214, mere labels are not dispositive).

Because the statute was enacted for the express purpose of insulating all participants in the construction process from the onerous task of defending against stale claims, *Wright v. Bd. of Educ.,* 335 Ill.App.3d 948, 269 Ill.Dec. 589, 781 N.E.2d 386, 391 (2002), the plain language of § 13-214(b) reflects that purpose and bars only those claims regarding *construction* of an improvement to real property. *MBA Enterprises, Inc. v. Northern Illinois Gas Co.,* 307

Ill.App.3d 285, 240 Ill.Dec. 500, 717 N.E.2d 849, 852 (1999). Thus, Illinois courts have held that for a defendant to benefit from § 13-214, the legal claims against it must arise out of construction-related activity. *Prate Installations, Inc. v. Thomas,* 363 Ill.App.3d 216, 299 Ill.Dec. 853, 842 N.E.2d 1205, 1208 (2006); *Morietta,* 283 Ill.Dec. 758, 808 N.E.2d at 1049. Where a defendant is not sued for its act or omission in a construction-related activity, § 13-214 does not apply. *Prate Installations Inc.,* 299 Ill.Dec. 853, 842 N.E.2d at 1208; *Krueger v. A.P. Green Refractories Co.,* 283 Ill.App.3d 300, 218 Ill.Dec. 626, 669 N.E.2d 947, 950 (1996); *see also State Farm,* 24 F.3d at 957 (negligent acts or omissions, being remote from building construction, were not the sort of activities that § 13-214 was intended to shield).

This rule carries much weight in the case at bar, for Ambrosia sued Peabody under the theory that Peabody was negligent in failing to provide adequate subjacent support for the surface, and the Fund sued Peabody under the theory that a surface property owner is entitled to subjacent support, and that right is absolute and without condition. Under Illinois law, these claims are appropriate, for subsidence claims are merely actions for the withdrawal of subjacent support. *See Lloyd v. Catlin Coal Co.,* 210 Ill. 460, 468, 71 N.E. 335 (1904). It is a general rule that the owner of the surface of land has a right to subjacent support for his land. *Mason v. Peabody Coal Co.,* 320 Ill.App. 350, 51 N.E.2d 285, 286 (1943); *see Wilms v. Jess,* 94 Ill. 464 (1880) (a coal company's liability depends not on fault but arises from its absolute duty to provide the surface with support). Where there has been no release or waiver, this right is absolute and does not

depend upon whether the mining is done with the greatest degree of care or in accordance with the most approved system of mining. *Mason,* 320 Ill.App. 350, 51 N.E.2d at 286; *see Tankersley v. Peabody,* 31 Ill.2d 496, 202 N.E.2d 498 (1964) (coal company is liable only for subsidences and the resultant damages due to its own mining operations); *Buis v. Peabody,* 41 Ill.App.2d 317 (1963) (same).

Moreover, under RESTATEMENT (SECOND) TORTS § 820, such suits are also appropriate, in that one who withdraws naturally necessary subjacent support of another's land is subject to liability. If subsidence occurs, the action is complete and the party that withdraws the support is strictly liable. See RESTATEMENT (SECOND) TORTS § 820(1), cmt. g. In this instance, Peabody became liable as soon as it withdrew the natural support for Ambrosia's land.

It is undisputed that Peabody was *not* sued for its acts or omissions related to construction activities. Instead, Peabody was sued in its capacity as owner of the mineral estate at the time of the withdrawal of support. This garners further support for the inapplicability of § 13-214 to the claims against Peabody, because the statute of repose does not apply to suits against a landowner solely as a landowner. *See DeMarco v. Ecklund,* 341 Ill.App.3d 225, 275 Ill.Dec. 173, 792 N.E.2d 404, 406-07 (2003) (a landowner must face suit for an act or omission in a construction-related activity in order for § 13-214(b) to come into play); *Kamp v. Preis,* 332 Ill.App.3d 1115, 266 Ill.Dec. 426, 774 N.E.2d 865, 873 (2002) (same); *MBA Enterprises,* 240 Ill.Dec. 500, 717 N.E.2d at 851 (§ 13-214(b) does not apply to an action against a

landowner because action was based on landowner's ongoing duty of care, and not on construction-related activities); *Prochnow v. El Paso Golf Club, Inc.*, 253 Ill.App.3d 387, 192 Ill.Dec. 614, 625 N.E.2d 769, 773 (1993) (the allegations of the complaint were based on the ownership of the property rather than on any of the enumerated activities in § 13-214(b)); *C.S. Johnson Co. v. Champaign Nat'l Bank*, 126 Ill.App.3d 508, 81 Ill.Dec. 663, 467 N.E.2d 363, 365 (1984) (§ 13-214 does not apply to defendants for damage to property where action is based on the defendant's status as a landowner, and not one of the enumerated activities in the statute).

We believe the claims against Peabody have been mischaracterized from the beginning. To the extent the claims are for damages against Peabody for construction-related activities enumerated by § 13-214(b), the statute of repose would apply to bar the claim, because a coal mine is an "improvement to real property" within the meaning of the statute and Illinois case law interpreting it. However, to the extent the claim is one for damages against Peabody as a landowner (which we believe is the case) for withdrawal of subjacent support under Illinois law, as well as withdrawal of subjacent support that is "naturally necessary" for the support of surface property in another's possession under RESTATEMENT (SECOND) OF TORTS § 820, the statute of repose does not apply, because a claim of this sort is not premised

upon one of the acts or omissions enumerated in the statute.[3]

The district court below focused on whether the coal mine was an "improvement to real property," in that there was no dispute of fact that the mining affecting the property occurred over forty years prior to the suit. The court, however, failed to address the other requirement for the application of § 13-214—whether Peabody was a party engaged in any of the enumerated activities protected under the statute.

Our *de novo* review is limited to legal issues and conclusions. *West Allis Memorial Hosp., Inc. v. Bowen,* 852 F.2d 251, 258 (7th Cir. 1988). We may decide the merits of legal issues which were not addressed by the district court only when the facts on which those conclusions are based are not in dispute. *Id; see also K and N Engineering, Inc. v. Bulat,* 510 F.3d 1079, 1081 n.2 (9th Cir. 2007) (a court of appeals may exercise its discretion to review issue that had not been raised before district court, where issue involves purely legal question of statutory interpretation and pertinent record has been fully developed); *Norfolk Southern Ry. Co. v. Basell USA Inc.,* 512 F.3d 86, 97 (3d Cir. 2008) (a district court's failure to consider an issue below does not necessarily preclude the Court of Appeals

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[3] Reviewing Ambrosia's complaint, the negligence claim against Peabody may also fall under RESTATEMENT (SECOND) OF TORTS § 821, which applies where the withdrawal of subjacent support that is not "naturally necessary," but rather, is necessary to support the surface land *and* its artificial additions.

from addressing it; however, it is only appropriate for it to do so when the factual record is developed and the issues present purely legal questions, upon which an appellate court exercises plenary review). Peabody was sued in its capacity as the owner of the Mine, not as a party engaging in construction-related activities. Therefore, we find that, as a matter of law, § 13-214(b) does not bar Plaintiffs's claims against Peabody.

III. Conclusion

Because we find that Peabody, sued in its status as a landowner, does not fall within the protection of § 13-214(b) as a matter of law, summary judgment was improper. Accordingly, we reverse the district court's grant of summary judgment and remand for further proceedings not inconsistent with this opinion.

CUDAHY, *Circuit Judge*, concurring. I am pleased to join the excellent majority opinion and particularly its important outcome. The issue resolved here is of more than passing significance because, for all practical purposes, an opposite result would slam the door almost completely on claims for coal mine subsidence in Illinois. Coal mine subsidence is usually a long-term proposition. The subsidence alleged in this case took place forty years after operations at the St. Ellen mine had ceased. *See also Tankersley v. Peabody Coal Co.*, 31 Ill.2d 496, 202 N.E.2d 498 (1964) (forty years); *Nida v. American Rock Crusher Co.*, 253 Kan. 230, 855 P.2d 81 (1993) (thirty years). The application of a ten-year statute of repose would block recovery for subsidence damage in all but the rare case where collapse follows promptly upon excavation. This would be good news for coal mining companies and bad news

for the neighbors of their mines. With an opposite result here, the Illinois Mine Subsidence Insurance Fund might as well go out of business.

Illinois has had a construction statute of repose since 1979. *See* 735 ILCS 5/13-214(b) (2007). Nearly every state in the nation now has a construction statute of repose; many of these statutes contain wording that is similar to the Illinois statute. Yet no court in the nation has ever held that digging a coal mine was an act of "construction" or an "improvement to real property" or anything analogous to those statutory requirements.[1] As far as I can tell, no defendant has even *argued* that a construction statute of repose applied to mining operations—not even in the leading mining jurisdictions of Pennsylvania and West Virginia. It would surely be an ill-starred innovation here to find that what is essentially digging a hole in the ground is an act of "construction of an improvement to real property" controlled by the statute of repose.

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[1] Actually, Peabody made the same argument in another recent case involving subsidence damage over the St. Ellen mine. *See Illinois Mine Subsidence Fund v. Peabody Coal Co.*, 383 F.Supp.2d 1078 (C.D.Ill.2005). Peabody prevailed in that case and, not surprisingly, has asked us to apply the rule of res judicata. I would decline to do so, as the majority apparently has, since the application of res judicata in this case would foreclose an important opportunity to reconsider a legal rule of great general concern. *See Chicago Truck Drivers, Helpers and Warehouse Union (Independent) Pension Fund v. Century Motor Freight, Inc.*, 125 F.3d 526, 531 (7th Cir. 1997).

I.

The parties here raised at length, and the majority opinion contains an extended discussion of, the term "improvement to real property," which although relevant is really not central to the present issue. The extraction of the coal is the legal cause of the injury here,[2] and this fact should govern our interpretation of the statute of repose. To benefit from the statute, Peabody must show that Ambrosia's mine subsidence claim (which results from coal removal) arises out of a construction-related activity. *See, e.g., King v. Paul J. Krez Co.*, 323 Ill.App.3d 532, 538-39, 256 Ill.Dec. 725, 752 N.E.2d 605 (2001); *MBA Enterprises, Inc. v. Northern Illinois Gas Co.*, 307 Ill.App.3d 285, 288, 240 Ill.Dec. 500, 717 N.E.2d 849 (1999); *Krueger v. A.P. Green Refractories Co.*, 283 Ill.App.3d 300, 304, 218 Ill.Dec. 626, 669 N.E.2d 947 (1996). The requirement of a nexus between the legal claim and the construction-related activity is not simply a judicial gloss; the Illinois statute of repose applies only to an "action ... *for* an act or omission ... of construction." 735 ILCS 5/13-214(b) (emphasis added). If the construction-related activity is the sole basis of the legal claim, the statute bars the claim. *See MBA Enterprises*, 307 Ill.App.3d at 288. If, however, the legal claim is, as here, based on activities unrelated to the construction, the statute does not apply. *Id.*

The purpose of the "improvement to real property" language in the statute is to limit the type of

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[2] Installing lights and other equipment incidental to mining does not cause subsidence.

"construction" that the statute contemplates. Thus "construction" is anterior to "improvement"; there must be "construction" before its object, "improvement to real property," is in issue. By referring to "improvement to real property," the statute distinguishes between construction involving *personal property* (not covered) and construction of an improvement to *real property* (covered). But, before the nature of an improvement to real property is an issue, there must be "construction" to create it.

The rule that the legal claim must be based on construction-related activity has an important corollary, one that is dispositive in this case. Illinois courts have been clear, as is the majority opinion, that the statute does not bar claims made against a landowner solely in his or her capacity as landowner, as in subsidence claims. *See Continental Ins. Co. v. Walsh Const. Co. of Illinois,* 171 Ill.App.3d 135, 139, 121 Ill.Dec. 83, 524 N.E.2d 1131 (1988); *C.S. Johnson Co. v. Champaign Nat. Bank,* 126 Ill.App.3d 508, 511, 81 Ill.Dec. 663, 467 N.E.2d 363 (1984). One defining characteristic of a suit against a landowner *qua* landowner is that it proceeds on a theory of strict liability as distinguished from a theory of negligence.

Although one may think erroneously of subsidence claims as involving negligence, such suits are actually merely actions for the withdrawal of subjacent support. *See Lloyd v. Catlin Coal Co.,* 210 Ill. 460, 468, 71 N.E. 335 (1904); RESTATEMENT (SECOND) OF TORTS, § 820(1) (1979). The degree of care used in the withdrawal of support is completely irrelevant; as soon as the owner of a mineral estate withdraws *any* natural support from the surface estate, it becomes

subject to liability for such a withdrawal. *See Standard Oil Co. v. Watts,* 17 F.2d 981, 982 (7th Cir. 1927) (applying Illinois law). It is the extraction of coal to create a hole or a void (or a "room") that creates the potential for subsidence and damage. When subsidence occurs, the action is complete and the owner of the mineral estate becomes liable without regard to negligence. *See* RESTATEMENT (SECOND) OF TORTS, § 820(1) cmt. g (1979). If the owner of the mineral estate does not wish to be subject to this ongoing liability, it has only two options: "Furnish[ ] artificial support sufficient to replace the natural support withdrawn" or pray that there is no subsidence. *Id.* This is all well settled. *See Wilms v. Jess,* 94 Ill. 464 (1880); *Buis v. Peabody Coal Co.,* 41 Ill.App.2d 317, 190 N.E.2d 507 (1963); *Wanless v. Peabody Coal Co.,* 294 Ill.App. 401, 13 N.E.2d 996 (1938); *Treece v. Southern Gem Coal Co.,* 245 Ill.App. 113 (1923).

With this proper backdrop in place, it becomes clear that Ambrosia's mine subsidence claim is based on something other than activity related to construction. Peabody decided to extract coal from below the Ambrosia property. It does not claim that it secured a waiver of Ambrosia's right to subjacent support. Under Illinois law, Peabody becomes subject to liability as soon as any natural support for Ambrosia's land is removed. Thus, when Peabody removed its first shovelful of coal, it became subject to liability in the event of a mine subsidence. *See Watts,* 17 F.2d at 982. When the subsidence occurred in 2000, Ambrosia sued Peabody in its capacity as the owner of the mineral estate at the time of the withdrawal of support. This is entirely appropriate under Illinois law. *See Buis,* 41 Ill.App.2d at 323, 190 N.E.2d 507. Further, it is clear

that this is a suit between owners solely as owners; the statute of repose, therefore, does not apply. *See C.S. Johnson Co.*, 126 Ill.App.3d at 511.

II.

A room and pillar mine is essentially a hole—an incomplete hole because pillars are left in place to prevent subsidence. One could not argue that the hole (or the "room") has been "constructed"; it is simply the void left after the coal is removed. The pillars are not constructed either; they are simply coal that has been left behind. Even if we were to consider the overall design of the mine, it is simply the absence of the coal that caused the damage, and the effectuation of its removal is not construction. Thus, Peabody has no evidence that it "constructed" anything that caused the subsidence: Even the creation of the pillars, if that were considered "construction," is not relevant since that is certainly not the cause of the subsidence. As has been noted, it is the legal cause of the injury which must meet the requirements of the statute of repose.

Although the matter is not central, Peabody has also not shown that there was an "improvement to real property" here. An improvement implies some kind of addition. *See Calumet Country Club v. Roberts Environmental Control Corp.*, 136 Ill.App.3d 610, 613, 91 Ill.Dec. 267, 483 N.E.2d 613 (1985). Peabody has argued the factors defining an improvement as set forth in *St. Louis v. Rockwell Graphic Systems, Inc.*, 153 Ill.2d 1, 178 Ill.Dec. 761, 605 N.E.2d 555 (1992). The application of these factors, however, assumes that an "addition" has occurred or been found. *Id.* at 4. Peabody has stressed that the pillars served an

important purpose because they supported the ceiling of the mine. But the pillars merely "replace" the support provided by the preexisting coal or, more literally, merely form a portion of the preexisting coal, the remainder of which has been removed. The pillars of unmined coal are certainly not an addition. Once the coal is removed, the pillars must support *both* the surface above them and the surface above the newly created rooms. The pillars are nothing more than a partial replacement for the support that has been removed. Replacement, however, is not improvement. *See Calumet,* 136 Ill.App.3d at 613.

III.

Applying the statute of repose in this case does nothing to further its purpose. Statutes of repose are intended to protect against stale claims. *See Wright v. Board of Educ. of City of Chicago,* 335 Ill.App.3d 948, 955-56, 269 Ill.Dec. 589, 781 N.E.2d 386 (2002). Peabody argues that this case presents "the very problem the Statute of Repose seeks to avoid" because "the task of locating living witnesses and pertinent documents is virtually impossible." Appellee Br.11. This argument represents a fundamental misunderstanding of Illinois mine subsidence law. Ambrosia is under no obligation to show that Peabody breached a duty of care, and any showing by Peabody that it used due care is irrelevant. Put simply, Peabody's actions from 1957 to 1960 are not at issue in this case. Peabody already admits that it extracted coal during that period, thus Peabody is already subject to liability for a subsidence. Peabody's only available defenses are that there was, in fact, no subsidence, or that some other force caused the

subsidence. *See Watts,* 17 F.2d at 982. Both of those inquiries are related to the here and now—that is, both relate to the subsidence event that is alleged to have occurred on Ambrosia's property in 2000.

IV.

I therefore agree with the conclusion reached by the majority and, in general, with its analysis, with emphasis on the matters I have discussed. And I would reiterate my belief in the importance of this issue and its proper resolution.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ILLINOIS

Case No. 05-cv-371-DRH

[Filed March 27, 2007]

WILKE WINDOW & DOOR COMPANY,
Plaintiff,

ILLINOIS MINE SUBSIDENCE INSURANCE FUND,
Intervening Plaintiff,

v.

PEABODY COAL COMPANY,
Defendant.

MEMORANDUM & ORDER

HERNDON, District Judge:

I. INTRODUCTION

In this case, Plaintiff has filed a suit for damages to its warehouse allegedly caused by mine subsidence. Pending before the Court are summary judgment motions, filed by the parties. Plaintiff Wilke Window

& Door Company ("Wilke") moves for a partial summary judgment (Doc. 42) in its favor on liability regarding Count I of its Complaint (Doc. 2), which states a claim of negligence. Intervening plaintiff Illinois Mine Subsidence Insurance Fund (the "Fund"), moves for summary judgment (Doc. 42) in its favor regarding its Intervening Complaint (Doc. 23) on both liability and damages. Defendant Peabody Coal Company ("Peabody"), has also moved for summary judgment (Doc. 40) in its favor on the grounds that Plaintiffs' claims are barred. Thus, the Court must first look at the issue of whether any or all of Plaintiffs' claims are barred. If so, the Court need not delve further. However, if Peabody's affirmative defenses do not prevail, the Court must then turn to the issue of liability and finally, damages.

II. BACKGROUND

Wilke owns property in St. Clair County, Illinois (the "Wilke Property") and on this property, it built a large warehouse to use for its business. It is undisputed that the Wilke Property is located above the St. Ellen mine, which is an underground coal mine encompassing more than 3800 acres. The parties do not dispute that the St. Ellen mine is what is known as a "room and pillar" mine. As explained by the briefs, room and pillar mining is a method of removing coal from underground; the mined out areas thus become the "rooms." Yet, this mining methodology requires some of the coal to remain. "Pillars" must be formed from remaining coal and rock in order to provide the primary and permanent support for these rooms and ultimately, the overlying strata, including the surface of the earth above the mine. Generally, these pillars

are quite large, measuring at least 30 feet square. The ultimate design of a room and pillar mine, therefore, depends substantially upon the number, size and placement of the pillars. Secondary support, such as timber, cribbing, bolts, blocking and backfill material, was also likely installed in the St. Ellen mine.

Mine subsidence is the effect resulting from the failure of a pillar or series of pillars over time, caused by factors such as deterioration of pillars, design defects or certain geologic occurrences. When the overlying strata collapses due to mine subsidence, the surface realty above the mine can also subside, causing damages. Also undisputed by the parties is the fact that the mining affecting the Wilke property took place no later than 1960, as that is the year Peabody ceased mining the St. Ellen mine. The mine was then closed and abandoned.

Wilke alleges it first noticed its warehouse seemed to have structural damage in late November 2000. Wilke filed a claim with its insurance company, Federated, for this suspected mine subsidence damage. The Fund, created by the State of Illinois to provide reinsurance for certain mine subsidence losses to properties located in-state, received Wilke's claim, forwarded by Federated. During its investigation of Wilke's claim, the Fund geologist concluded that mine subsidence of the St. Ellen mine caused damage to the Wilke Property and warehouse. Due to this finding, the Fund paid the maximum amount of reinsurance for Wilke's claim: $350,000.00. However, Plaintiffs assert that the actual damage substantially exceeds this amount.

Wilke then filed suit against Peabody in state court, on April 21, 2005, alleging two Counts: Count I for negligence for Peabody's failure to provide adequate support for the land surface above the St. Ellen mine and Count II pursuant to the Illinois Surface Coal Mining Land Conservation and Reclamation Act ("SCMLCRA"), **225 ILL. COMP. STAT. 720/4.02**.[1] On the basis of diversity jurisdiction, **28 U.S.C. § 1332**, Defendant timely removed Wilke's suit; Wilke did not pursue a remand. In October 2005, the Fund moved to intervene (Doc. 14) as an additional plaintiff in this matter, pursuant to **215 ILL. COMP. STAT. 5/815.1**, claiming it is "subrogated to the right of Wilke against Defendant and has the legal right to sue in its own name for its loss it paid relating to mine subsidence damage to the warehouse ..." (Doc. 23, ¶ 14). In other words, the Fund seeks to recover from Peabody the $350,000.00 it paid to Wilke for its mine subsidence claim, pursuant to the Fund's reinsurance agreement with Wilke's insurer, Federated.

As previously stated in this Order, Wilke and the Fund have filed a joint Motion for Summary Judgment (Doc. 42) and Peabody has filed its own Motion for Summary Judgment (Doc. 40). Both Motions have been fully briefed and are ripe for resolution.

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[1] Peabody also brought this suit against other Defendants, but has since voluntarily dismissed them, leaving Peabody as the only remaining defendant.

III. LEGAL STANDARD

Summary judgment is appropriate under the Federal Rules of Civil Procedure when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." **FED. R. CIV. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986)**. The movant bears the burden of establishing the absence of factual issues and entitlement to judgment as a matter of law. ***Wollin v. Gondert*, 192 F.3d 616, 621-22 (7th Cir. 1999)**. The Court must consider the entire record, drawing reasonable inferences and resolving factual disputes in favor of the non-movant. ***Schneiker v. Fortis Ins. Co.*, 200 F.3d 1055, 1057 (7th Cir. 2000); *Baron v. City of Highland Park*, 195 F.3d 333, 337-38 (7th Cir. 1999)**.

IV. DISCUSSION

Both summary judgment motions, although premised upon different legal grounds, interconnect such that an argument advanced by one side in favor of its motion becomes its defense against granting the other side's motion and vice-versa (i.e., Peabody, in its Response, also adopts its own Motion for Summary Judgment and supporting memorandum as its opposition to Plaintiffs' Motion for Summary Judgment). Yet, because Peabody's asserted grounds for summary judgment are largely affirmative defenses which, if prevailing, would serve to moot Plaintiffs' grounds for summary judgment, logic

dictates the Court first address Peabody's Motion (Doc. 40).

A. Peabody's Motion for Summary Judgment

Peabody asserts it is entitled to summary judgment in its favor as a matter of law, as it believes Plaintiffs' entire suit is barred by **735 ILL. COMP. STAT. 5/13-214(b)**, commonly known as Illinois' "Construction Statute of Repose" (doc. 41, pp. 6-12).[2] Should the Court find this argument lacks merit, Peabody advances three additional bases of why the entire suit is barred as a matter of law. First, Peabody argues that the Fund's suit (not Wilke's) is barred by the doctrine of *res judicata* and collateral estoppel (id. at 13-16). Second, Peabody argues Wilke's claims are barred by the four-year statute of limitations period found in the same statutory section as the Construction Statute of Repose, in a separate subsection: **735 ILL. COMP. STAT. 5/13-214(a)** (*id.* at 16-18). Lastly, Peabody argues Wilke cannot state a valid cause of action under SCMLCRA (Count II of Wilke's Complaint), as the Act was not even enacted until June 1, 1980 and is not intended to be retroactive. Thus, SCMLCRA, Peabody argues, should not apply in this matter as the mining events occurred no later than 1960-over 20 years before the enactment of SCMLCRA (*id.* at 18-19).

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[2] As this case is grounded in diversity, the Court will follow the substantive state law of Illinois, pursuant to the *Erie* doctrine.

1. Whether the Construction Statute of Repose Bars Plaintiffs' Claims

Peabody argues Plaintiffs' entire suit is barred by the Construction Statute of Repose, codified in **735 ILL. COMP. STAT. 5/13-214(b)**, which states, in pertinent part:

> No action based upon tort, contract or otherwise may be brought against any person for an act or omission of such person in the design, planning, supervision, observation or management of construction, or construction of an improvement to real property after 10 years have elapsed from the time of such act or omission.

As there is no real dispute of fact that the mining affecting the Wilke property occurred no later than 1960, the question becomes whether the Construction Statute of Repose applies to this case. The question of application, then, turns on whether the coal mine can be deemed "construction of an improvement to real property."

There is only a single case seemingly on-point with the material facts and issues present in this suit: ***Illinois Mine Subsidence Insurance Fund v. Peabody Coal Co.*, 282 F. Supp. 2d 1078 (C.D. Ill. 2005) (Mills, J.)** (hereinafter, "***Fund v. Peabody***"). In ***Fund v. Peabody***, the Fund brought suit as subrogee seeking damages for reinsurance reimbursements it paid for mine subsidence damage claims made on several different properties. The case involved certain properties located in St. Clair County, Illinois, which had been undermined by the St. Ellen mine – the same

coal mine that is at issue in this suit. On various cross motions for summary judgment, Judge Mills examined the identical issue of whether the Illinois Construction Statute of Response applied to underground "room and pillar" coal mines. The parties, two of which are currently parties to the present suit,[3] extensively briefed this issue, largely making the same arguments also made in this suit. Thus, the Central District analyzed all of the applicable Illinois case law that the parties also now cite and advocate their interpretations thereof.

a. Determining Precedent in a Diversity Case

Plaintiffs argue that ***Fund v. Peabody*** should not constitute binding precedent; instead, this Court, sitting in diversity, is bound to follow Illinois law when determining the issues. Continuing, as this is a case of first impression in Illinois, Plaintiffs ask the Court to conduct its own, independent analysis of Illinois law. Certainly, the Court never views an opinion by another federal district court as binding precedent, even if that district court is within the Seventh Circuit. However, the Court may, at times, find a court's rationale insightful, thereby electing to adopt the same or similar line of reasoning. Further, when determining an issue under state law, as federal courts with diversity jurisdiction often do, the holding of the

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[3] The Court observes the Fund's participation in this case, as well as ***Fund v. Peabody***, is in its capacity as subrogee, which is, additionally, the basis of its argument opposing Peabody's *res judicata* grounds for summary judgment.

highest court within that state will be followed, if it exists. ***Republic Tobacco Co. v. N. Atlantic Trading Co.*, 381 F.3d 717, 731 (7th Cir. 2004) ("[A]s a federal court sitting in diversity, we are obligated to apply Illinois law as announced by the Illinois Supreme Court.")**. When the Illinois Supreme Court has yet to decide the issue presented in a diversity case, a federal court should look to Illinois appellate court opinions, but only if they represent a credible prediction of how the Illinois Supreme Court would likely rule on the issue. ***Adams v. Catrambone*, 359 F.3d 858, 862 (7th Cir. 2004).** Lastly, a ruling on the issue by the Seventh Circuit, attempting to predict how the Illinois Supreme Court would rule, is binding on this Court, unless a later conflicting opinion is issued by the Illinois Supreme Court or subsequent Illinois appellate court opinions indicate the Seventh Circuit's prediction was likely inaccurate. ***See Herriott v. Allied-Signal, Inc.*, 801 F. Supp. 52, 54-5 (N.D. Ill. 1992) (citation omitted)**.

Presently, the Illinois Supreme Court has not yet decided the issue of whether an underground coal mine constitutes "construction of an improvement to real property" for purposes of the Illinois Construction Statute of Response In fact, there are also no existing Illinois appellate court or even Seventh Circuit opinions deciding the particular issue in this suit. Rather, ***Fund v. Peabody*** is the only case which has decided this issue, using Illinois law, and it is not binding upon this Court. Therefore, the Court will analyze how Illinois courts have defined "improvement to real property," in order to apply this definition in

determining whether an underground coal mine can properly be deemed as such.

b. Illinois Law Defining "Improvement to Real Property"

In the Illinois cases cited by the parties, the definition of "improvement to real property" is "an addition to real property amounting to more than mere repair or replacement and which substantially enhances the value of the property." ***Continental Ins. Co. v. Walsh Construction Co. of Ill.*, 171 Ill. App. 3d 135, 140 524 N.E.2d 1131, 1135 (Ill. App. Ct. 1st Dist. 1988) (citing *Calumet Country Club v. Roberts Environmental Control Corp.*, 136 Ill. App. 3d 610, 613, 483 N.E.2d 613, 616 (Ill. App. Ct. 1st Dist. 1985), *disagreed with on other grounds by Allstate Ins. Co. v. Menards, Inc.*, 202 Ill. 2d 586, 782 N.E.2d 258 (Ill. 2002))**. The definition of "improvement" was then somewhat expanded:

> A valuable addition made to property (usually real estate) or an amelioration in its condition, amounting to more than mere repairs or replacement, costing labor or capital, and intended to enhance its value, beauty or utility or to adapt it for new or further purposes.

***Cross v. Ainsworth Seed Co.*, 199 Ill. App. 3d 910, 921, 557 N.E.2d 906, 913 (Ill. App. Ct. 4th Dist. 1990) (quoting *Hilliard v. Lummus Co.*, 834 F.2d 1352, 1354 n.3 (7th Cir. 1987) (quoting BLACK'S LAW DICTIONARY 682 (5th ed. 1979)); *see also Billman v. Crown-Trygg Corp.*, 205 Ill. App. 3d**

916, 921, 563 N.E.2d 903, 906 (Ill. App. Ct. 1st Dist. 1990).

In light of this expanded definition of "improvement," the Illinois appellate courts found that an improvement "need not only enhance the 'value' of property," it could also "enhance the beauty or utility of that property or adopt it to different or further purposes." ***Billman*, 205 Ill. App. 3d at 921, 563 N.E.2d at 906**. Approximately two years later and in the most recent of its opinions on the definition of improvement, the Illinois Supreme Court first stated that the issue of "[w]hether an item constitutes an 'improvement to real property' is a question of law ..." with its "resolution ... grounded in fact." ***St. Louis v. Rockwell Graphic Sys., Inc.*, 153 Ill.2d 1, 3, 605 N.E.2d 555, 556 (Ill. 1992)**. The Illinois Supreme Court also noted that defining the parameters of "improvements to real property," was a matter of first impression. ***Id.*** First, as the Seventh Circuit had done in ***Hilliard***, the Illinois Supreme Court looked to the Black's law dictionary definition of "improvement." ***Id.* at 4, 605 N.E.2d at 556**. Also adopted from the Seventh Circuit's ***Hilliard*** decision were the relevant criteria to determine what constitutes an "improvement to real property": (1) whether the addition was meant to be permanent or temporary, (2) whether it became an integral component of the overall system, (3) whether the value of the property was increased, and (4) whether the use of the property was enhanced. ***Id.* at 5, 605 N.E.2d at 556 (citing *Hilliard*, 834 F.2d at 1354-58 and collecting cases)**.

Plaintiffs advocate a subsequent case opinion issued by the First District Appellate Court of Illinois: ***Bank of Ravenswood v. City of Chicago*, 307 Ill. App. 3d 161, 717 N.E.2d 478 (1999)**. In ***Ravenswood***, the First District cited the expanded definition of "improvement," as first applied by an Illinois appellate court in ***Cross***, as well as relevant criteria for determining what constitutes an improvement, set forth by the Illinois Supreme Court in ***St. Louis. Ravenswood*, 307 Ill. App. 3d at 166, 717 N.E.2d at 483**. The reasons Plaintiffs favor the ***Ravenswood*** opinion is because, in determining whether construction of an underground subway system constituted an improvement for purposes of the Construction Statute of Response, the First District appears to have added an additional element to the definition: that the item also relate "to the use or enjoyment of the real property located above it such that its presence could be considered an improvement." ***Id.* at 167, 717 N.E.2d at 483 (distinguishing the subway system at issue from an underground sewer system or construction work on a traffic intersection)**. This additional element, Plaintiffs argue, supports their argument that the St. Ellen mine does *not* constitute an improvement to real property, as it has absolutely no relation to the use or enjoyment of the Wilke property and warehouse situated on the surface of the earth above the underground coal mine.

Conversely, Peabody asserts that ***Ravenswood*** is a "renegade" case which adds a limitation that "cannot be harmonized with the definitional criteria" applied by previous Illinois case opinions determining the issue of what constitutes an "improvement" for the purposes of the Construction Statute of Repose (Doc.

49, p. 5). Indeed, in ***Fund v. Peabody***, Judge Mills found ***Ravenswood*** to be an anomaly, and therefore, unpersuasive:

> As Peabody alleges, it appears that ***Bank of Ravenswood*** is the only case which suggests that whether the structure has any relation to the use or enjoyment of the property above it is an important consideration. Moreover, that case seems to place an inordinate emphasis on whether the value was enhanced, which is just one of several factors. ***See Herriott v. Allied-Signal, Inc.*, 801 F. Supp. 52, 56 (N.D. Ill. 1992)** ("[U]nder this expanded definition, an improvement is not limited to that which 'substantially enhances' the value of the property. Rather, an improvement may also enhance the beauty or utility of that property or adapt the property to different or further purposes.").

383 F. Supp. 2d at 1097.

Examining ***Ravenswood***, it seems as though this additional requirement related "use or enjoyment" requirement for something to be considered an "improvement" was merely the First District's explanation of why it did not consider the subway system to meet the relevant definitional criteria set forth by the Illinois Supreme Court in ***St. Louis. Ravenswood*, 307 Ill. App. 3d at 167, 717 N.E .2d at 483 ("[W]hether the subway was an integral part of the function of the residential townhomes and enhanced the overall value .")**. Therefore, the Court does not believe it to be an actual expansion of the

definition of "improvement." Instead, the First District was attempting to analyze what constitutes "value enhancement." The additional fact that ***Ravenswood*** offers no authoritative support or other rationale for adding this additional definitive requirement, coupled with the insight provided by Judge Mills in ***Fund v. Peabody***, allows the Court to find ample leeway to reject Plaintiffs' argument that ***Ravenswood*** expands the definition of "improvement" under Illinois law. In other words, the Court will conservatively proceed to analyze whether the construction of the St. Ellen mine is an "improvement" for purposes of the Illinois Construction Statute of Repose, using the definition provided by the Illinois Supreme Court in ***St. Louis***.

c. Whether an Underground Coal Mine is an "Improvement"

The issue of whether the St. Ellen mine, an underground room and pillar coal mine, can be considered "construction of an improvement to real property" for purposes of the Illinois Construction Statute of Repose will be analyzed in accord with the definition of improvement, as recognized by the Illinois Supreme Court in ***St. Louis***. A definitional interpretation regarding coal mines has not yet been decided by the Illinois courts, therefore, in its own analysis, the Court will heed the findings in ***Fund v. Peabody***, as it is concentric with this case.

First, the Court notes that the parties argue whether building an underground coal mine is actually considered "construction," or, as Plaintiffs suggest, is really more of an excavation and removal of coal to create the hollowed out rooms and remaining pillar

structures of the mine. "Construction" is defined as "the process, act or manner of constructing Something." **MERRIAM WEBSTER'S COLLEGIATE DICTIONARY 248 (10th ed. 1997)**. Likewise, the applicable definition of "construct" is "to make or form by combining or arranging parts or elements." **MERRIAM WEBSTER'S COLLEGIATE DICTIONARY 248 (10th ed. 1997) (listing the term "build" as synonymous cross-reference)**. Lastly, the verb "form," is defined as to "shape or mold into a certain state...." **MERRIAM WEBSTER'S COLLEGIATE DICTIONARY 458 (10th ed. 1997)**. As there is nothing to indicate that the plain language meaning of "construction" should *not* be applied to the Construction Statute of Repose, the Court finds the creation of a room and pillar mine to sufficiently fit within the plain language meaning of "construction." Therefore, the analysis will continue.

The Court also finds that the St. Ellen mine would constitute a "valuable addition" to the real property. Agreeing with Peabody, in ***Fund v. Peabody***, the Central District found that for at least a brief period in time near the construction of the mine, the existence of mineral rights enhanced the real property's value for, at a minimum, "the surface owners who conveyed the mineral interests at the time of the mining." **383 F. Supp. 2d at 1096 (citing as an example, *Manning v. Frazier*, 96 Ill. 279, 1880 WL 10104 (1880))**. Quite obviously, the construction of the St. Ellen mine also amounted to more than a mere repair or replacement-this is not really disputed among the parties. Also, it is apparent labor and capital were expended in the construction of the St. Ellen mine. Thus, the Court must finally consider whether it was

intended to enhance the value, beauty or utility or to adopt the real property for new or further purposes. As ***Fund v. Peabody*** observed, "there is no question that the construction of an underground mine adds to the utility of the property and adapts it for further or additional purposes." ***Id.*** Prior to its construction, the real property could not be mined for coal whereas afterwards, the surface remained useful for a variety of purposes, while the underground could was then adapted for coal mining.

This finding also aligns with the "relevant criteria" to determine what constitutes an "improvement to real property." ***See St. Louis,*** **153 Ill.2d at 4-5, 605 N.E.2d at 556**. First, the construction of the St. Ellen mine was the "overall system," and it could fairly be stated that the rooms and pillars were also "integral components," necessary for providing the coal mine's overall support structure. Second, although no longer in use, the coal mine and its support system (pillars) were intended to be permanent rather than temporary; "intended to last beyond the duration of the actual mining." ***Fund v. Peabody,*** **963 F. Supp. 2d at 1096**. Mine subsidence, as previously explained, only occurs as the result of the unintentional or unforeseen deterioration or failure of the structures. Third, at one point in time, the value of the property was increased for the owner with interests in the existing mineral rights: the owner(s) generally received either a lump sum payment by the purchaser of the mineral interests or periodic royalties during the construction and

operation of the coal mining.[4] Lastly, the use of the property was enhanced because it could thereafter be mined for minerals necessary as a source of energy.

The Court finds that the construction of the St. Ellen mine constitutes "construction of an improvement to real property," for purposes of the Construction Statute of Repose. Therefore, as there is no dispute the construction occurred more than 10 years prior to the filing of this suit, Plaintiffs' claims are barred by the Construction Statute of Repose found in **735 ILL. COMP. STAT. 5/13-214(b)**. Peabody's Motion for Summary Judgment (Doc. 40) must prevail. Peabody, in its Motion (Doc. 40), also requested also requested an oral argument. Quite obviously, the Court deems this unnecessary and denies the request.

B. Plaintiffs' Motion for Summary Judgment

Due to the Court's finding that Plaintiffs' claims are barred by the Construction Statute of Repose, there is no need to address the grounds for their joint Motion for Summary Judgment (Doc. 42), nor is there need to address Peabody's additional grounds for summary judgment.

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[4] As an additional point, the Court has not found binding authority indicating a requisite certain temporal duration for which the value of the real property must remain enhanced due to the construction of the improvement.

V. CONCLUSION

Finding that the Illinois Construction Statute of Repose, codified in **735 ILL. COMP. STAT. 5/13-214(b)**, bars all of Plaintiffs' claims in this matter, Peabody's Motion for Summary Judgment (Doc. 40) is **GRANTED.** Accordingly, Plaintiffs' Motion for Summary Judgment and Motion for Partial Summary Judgment (Doc. 42) are hereby **DENIED AS MOOT.** The Clerk will enter summary judgment in favor of defendant Peabody and against plaintiffs Wilke and the Fund.

IT IS SO ORDERED.

Signed this 27th day of March, 2007

/s/ David RHerndon
United States District Judge

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604

No. 07-1945

[Filed May 12, 2008]

AMBROSIA LAND INVESTMENTS, LLC,
Plaintiff-Appellant,

and

ILLINOIS MINE SUBSIDENCE INSURANCE FUND,
Intervening Plaintiff-Appellant.

v.

PEABODY COAL COMPANY,
Defendant-Appellee.

Before
William J. Bauer, *Circuit Judge*
Richard D. Cudahy, *Circuit Judge*
Diane S. Sykes, *Circuit Judge*

Appeal from the United States District Court
for the Southern and District of Illinois.
No. 05 C 371

David R. Herndon, *Judge*.

ORDER

On consideration of defendant-appellee Peabody Coal Company's (now known as Heritage Coal Company, LLC) petition for rehearing with suggestion for rehearing *en banc* filed on April 22, 2008, in connection with the above-referenced case, no judge in active service has requested a vote on the petition for rehearing *en banc*[1] and all of the judges on the original panel have voted to deny the petition for rehearing. It is, therefore, ordered that the petition for rehearing with suggestion for rehearing *en banc* is **DENIED.**

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[1] Judge Ilana Diamond Rovner took no part in the consideration of this case.

105

(2)

No. 08-183

Supreme Court, U.S.
FILED
SEP 11 2008
OFFICE OF THE CLERK

In The
Supreme Court of the United States

HERITAGE COAL COMPANY, LLC,
formerly Peabody Coal Company, LLC,

Petitioner,

v.

AMBROSIA LAND INVESTMENTS, LLC,
formerly Wilke Window & ~~Door~~ Company, Inc. and
ILLINOIS MINE SUBSIDENCE INSURANCE FUND,

Respondents.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Seventh Circuit

BRIEF IN OPPOSITION ON BEHALF OF ILLINOIS MINE SUBSIDENCE INSURANCE FUND

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September 11, 2008

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
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RULE 29.6 DISCLOSURE

Illinois Mine Subsidence Insurance Fund was created in 1979 by the Illinois General Assembly as a reinsurer for mine subsidence insurance pursuant to 215 ILCS 5/801.1.

5/801.1. Purpose

> §801.1 Purpose. The purpose of this Article is to require insurers to make mine subsidence insurance coverage available for residences, living units and commercial buildings located in Illinois; to establish the Illinois Mine Subsidence Insurance Fund; to divide the Fund into separate residential and commercial sub-funds; and to make the Fund the reinsurer for the mine subsidence insurance made available under this Article.

TABLE OF CONTENTS

Page

RULE 29.6 DISCLOSURE i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

ARGUMENT 1

CONCLUSION 4

TABLE OF AUTHORITIES

Page

CASES

Am. Nat'l Bk. & Trust Co. v. Booth/Hansen, 186 Ill.App.3d 865, 542 N.E.2d 925 (1989) 3

C.S. Johnson Co. v. Champaign Nat'l Bank, 126 Ill.App.3d 508, 467 N.E.2d 363 (1984) 1

Commonwealth Edison Co. v. Walsh Const. Co., 177 Ill.App.3d 373, 532 N.E.2d 346 (1988) 3

Continental Ins. Co. v. Walsh Const. Co., 171 Ill.App.3d 135, 524 N.E.2d 1131 (1988) 3

Lloyd v. Catlin Coal Co., 210 Ill. 460, 71 N.E. 335 (1904) 3

Stetson v. Howard D. Wolf & Associates, 955 F.2d 847 (2nd Cir. 1992) 3

Trierweiler v. Croxton and Trench Holding Corp., 90 F.3d 1523 (10th Cir. 1996) 3

RULES

Supreme Court Rule 10 1

ARGUMENT

The Petition should be denied because there are no compelling reasons for it to be granted. The Petition fails to meet any of the tests set forth in United States Supreme Court Rule 10. The issue decided by the U.S. Court of Appeals for the Seventh Circuit was whether the Illinois statute of repose was a valid affirmative defense to Plaintiffs' claims for damage caused by mine subsidence.[1] The Court of Appeals held that it was not. That decision does not conflict with another Court of Appeals decision and federal law is not at issue. The Seventh Circuit decision also does not conflict with a subsequently decided Illinois Supreme Court opinion and there is also no need for this Court to exercise its supervisory power because the Court of Appeals appropriately exercised its discretion and did not depart from the accepted and usual course of judicial proceedings.

As noted by the Seventh Circuit, it has long been the law that a Court of Appeals may address legal issues not addressed by a district court when the facts on which those conclusions are based are not in dispute. (Pet. App. p. 17a). The facts are not in dispute here.

---

[1] The Illinois statute of repose is an affirmative defense, and was pleaded as such by Petitioner. It was Petitioner's burden to establish that it was entitled to the protection of the Statute, and thus to show that it engaged in activities which brought it within the Statute. *C.S. Johnson Co. v. Champaign Nat'l Bank*, 126 Ill.App.3d 508, 511, 467 N.E.2d 363 (1984).

Petitioner asserts repeatedly in its first argument that this is a case of first impression. (Pet. pp. 5-7, 9). That claim is wrong insofar as Petitioner objects to the Court of Appeals' opinion. While this was a case of first impression as to whether the excavation of coal from an underground coal mine was "construction of an improvement to real property" within the meaning of the Illinois statute of repose, Petitioner prevailed on that issue. (Pet. App. pp. 7a-12a).

The Court of Appeals decision was not a matter of first impression on the issues decided adversely to Petitioner. That application of the Illinois statute of repose involved a two-step analysis under Illinois law was not a matter of first impression. (Pet. App. 6a). That the statute of repose does not apply to suits against landowners solely as owners was not a matter of first impression. (Pet. App. pp. 15a, 16a). The Court of Appeals decision on those issues was based on well-established Illinois case law, which the Court of Appeals cited and which Petitioner does not challenge. Contrary to Petitioner's assertion, the Court of Appeals did not "conjure up its own reasons" for reversing the District Court. (Pet. p. 6).

While Petitioner claims that the Court of Appeals overreached, it does not dispute the authorities cited by the Court of Appeals. The Seventh Circuit stated, correctly, that it was entitled to exercise its discretionary review powers where the record was fully developed and the issue presented purely legal questions. (Pet. App. pp. 17a, 18a). The Court of Appeals'

power to do so in this case is supported not only by the authorities it cited, but also by *Stetson v. Howard D. Wolf & Associates*, 955 F.2d 847, 850 (2nd Cir. 1992) and *Trierweiler v. Croxton and Trench Holding Corp.*, 90 F.3d 1523, 1538, 1539 (10th Cir. 1996).

Petitioner's second argument is nothing more than a semantic quibble, despite its protestations to the contrary. While Petitioner claims that withdrawal of coal is not wrongful, Illinois law is to the contrary. As the Illinois Supreme Court stated, if "the removal of any" coal causes loss of the necessary surface support, the entity removing the coal is liable to the surface landowner. *Lloyd v. Catlin Coal Co.*, 210 Ill. 460, 468, 71 N.E. 335 (1904). It is obvious that it is the removal of coal which creates the conditions necessary for mine subsidence. Without removal, there could be no subsidence.

Petitioner's claim that the Court of Appeals' decision undercuts Illinois law, as set forth in *Am. Nat'l Bk. & Trust Co. v. Booth/Hansen*, 186 Ill.App.3d 865, 542 N.E.2d 925 (1989), *Commonwealth Edison Co. v. Walsh Const. Co.*, 177 Ill.App.3d 373, 532 N.E.2d 346 (1988) and *Continental Ins. Co. v. Walsh Const. Co.*, 171 Ill.App.3d 135, 524 N.E.2d 1131 (1988) is also wrong. (Pet. pp. 11 n.3; 16). The defendants in all of those cases were hired for and engaged in the construction process, and thus entitled to the protections of the statute of repose. None of the defendants were owners of the subjacent land, and

thus were not sued as owners. The Court of Appeals decision has no effect on those decisions.

CONCLUSION

There is simply no compelling reason for this Court to review this question of Illinois law, and the Petition should be denied.

Respectfully submitted,

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106

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No. 08-183

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In The
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HERITAGE COAL COMPANY, LLC,
formerly Peabody Coal Company, LLC,
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v.

AMBROSIA LAND INVESTMENTS, LLC, formerly Wilke Window & Door Company, Inc. and ILLINOIS MINE SUBSIDENCE INSURANCE FUND,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

ARGUMENT 1

CONCLUSION 5

TABLE OF AUTHORITIES

CASES

Am. Nat'l Bank & Trust Co. of Chicago v. Booth/Hansen Associates, Ltd., 186 Ill.App.3d 865, 542 N.E.2d 925 (1989) 4

C.S. Johnson Co. v. Champaign Nat'l Bank, 126 Ill.App.3d 508, 467 N.E.2d 363 (1984) 3

Commonwealth Edison Co. v. Walsh Const. Co., 177 Ill.App.3d 373, 532 N.E.2d 346 (1988) 4

Cont'l Ins. Co. v. Walsh Const. Co. of Ill., 171 Ill.App.3d 135, 524 N.E.2d 1131 (1988) ... 4

Hausman v. Monarch Mach. Tool Co., 997 F.2d 351 (7th Cir. 1993) 4

K and N Eng'g, Inc. v. Bulat, 510 F.3d 1079 (9th Cir. 2007) 1

Lloyd v. Catlin Coal Co., 210 Ill. 460, 71 N.E. 335 (1904) 2, 3

Norfolk & S. Ry. Co. v. Basell USA Inc., 512 F.3d 86 (3rd Cir. 2008) 1, 2

Stetson v. Howard D. Wolf & Associates, 955 F.2d 847 (2nd Cir. 1992) 2

Trierweiler v. Croxton & Trench Holding Corp., 90 F.3d 1523 (10th Cir. 1996) 2

West Allis Mem'l Hosp. v. Bowen,
852 F.2d 251 (7th Cir. 1988) 1, 2

Wright v. Bd. of Educ. of City of Chicago,
335 Ill.App.3d 948, 781 N.E.2d 386 (2002) 4

Petitioner, Heritage Coal Company, LLC, formerly Peabody Coal Company, LLC, submits this Reply to the Brief in Opposition of Illinois Mine Subsidence Insurance Fund on the Petition for Writ of Certiorari:

ARGUMENT

I.

Not surprisingly, Respondent is unable to defend, with legal authority, the Court of Appeals' unprecedented and unwarranted extension of its appellate jurisdiction in this case. On the other hand, it is surprising that Respondent would suggest that Petitioner "does not dispute" the authorities cited by the Seventh Circuit, which it used in concluding it was entitled to decide an issue not raised in the district court, where the issue involves a purely legal question of statutory interpretation and the pertinent record is fully developed.[1] Resp't Br. 2, Pet. App. 17a-18a. Unlike the present case, in each of the cases relied upon by the lower court, the arguments upon which the Court of Appeals relied were at least raised on appeal. West Allis Mem'l Hosp. v. Bowen, 852 F.2d 251 (7th Cir. 1988); K and N Eng'g, Inc. v. Bulat, 510 F.3d 1079 (9th Cir. 2007); Norfolk & S. Ry. Co. v. Basell USA Inc., 512 F.3d 86 (3rd Cir. 2008). Even then, the Courts in those cases declined to consider the new argument raised on appeal in two of those three cases.

---

[1] It should also be noted that this case did not present a case of pure statutory construction. As the lower court itself acknowledged, applicability of the Statute of Repose is a question of law, the resolution of which is grounded in fact. Pet. App. 7a.

West Allis Mem'l Hosp., 852 F.2d at 258 and Norfolk & S. Ry. Co., 512 F.3d at 97.

The additional cases cited by Respondent are equally unavailing. In Stetson v. Howard D. Wolf & Associates, 955 F.2d 847, 848 (2nd Cir. 1992), the Court actually accepted the argument advanced by the appellee on appeal in affirming the district court. Likewise, in Trierweiler v. Croxton & Trench Holding Corp., 90 F.3d 1523, 1538 (10th Cir. 1996), the specific grounds relied upon by the Court had been advanced on appeal.

In this case, the lower court clearly overstepped the bounds of its discretionary appellate jurisdiction. Frankly, Petitioner cannot criticize Respondent for its inability to justify the lower court's action. There is no authority to support it. Neither this court, nor any other federal appellate court appears to have stretched its appellate jurisdiction to the limits the lower court did here.

II.

However, Petitioner does criticize Respondent's futile attempt to defend the Court of Appeals' decision on the merits. Indeed, Respondent only references the same case relied upon by the lower court, Lloyd v. Catlin Coal Co., 210 Ill. 460, 71 N.E. 335 (1904), and repeats the same error of the lower court in suggesting that Lloyd holds that it is only the "removal of coal" which subjects the coal operator to liability for resulting subsidence. Resp't Br. 3. That single phrase was not the Court's holding, nor does it accurately state the nature of a subsidence cause of action.

It is not just the removal of the coal, but where the surface owner "is deprived of the necessary support for his land" that liability attaches. Lloyd, 210 Ill. at 468. The removal of coal was Petitioner's right. The failure to provide adequate support was the breach of duty, giving rise to the cause of action. Of course, the formation of that pillar support, and its failure, is the very construction-related activity making applicable the Statute of Repose.

It is wrong to simply extract a phrase from another judicial decision in order to reach a desired result. Yet, that is exactly what has happened in the present case, and without the benefit of input from the parties either in the trial court or even on the appeal: The adversarial process is designed to refine the issues, identify the applicable law and flush out the proper legal analysis. In this case, the adversarial process was not just ignored. The lower court rejected it outright. Pet. App. 16a.

C.S. Johnson Co. v. Champaign Nat'l Bank, 126 Ill.App.3d 508, 467 N.E.2d 363 (1984) is also of no aid to Respondent in defending the appellate court's decision. Resp't Br. 1, n. 1. In that case, defendants did not sustain their burden of proof on the Statute of Repose defense, as they presented no evidence or arguments that they in fact designed, planned, supervised, observed or managed the construction on their property. Id. at 511. In this case, Petitioner presented such evidence. Indeed, as Respondent now concedes, Petitioner "prevailed" in establishing that the underground mine constituted "construction of an improvement to real property within the meaning of the" Statute. Resp't Br. 2.

Respondent also cannot distinguish the holdings of Am. Nat'l Bank & Trust Co. of Chicago v. Booth/Hansen Associates, Ltd., 186 Ill.App.3d 865, 542 N.E.2d 925 (1989), Commonwealth Edison Co. v. Walsh Const. Co., 177 Ill.App.3d 373, 532 N.E.2d 346 (1988) and Cont'l Ins. Co. v. Walsh Const. Co. of Ill., 171 Ill.App.3d 135, 524 N.E.2d 1131 (1988) simply because the defendants in those cases were "hired for" the construction process, and were not owners of the land. The Construction Statute protects "anyone who engages in the enumerated activities" in the Statute, Hausman v. Monarch Mach. Tool Co., 997 F.2d 351, 354 (7th Cir. 1993), including owners of land. Wright v. Bd. of Educ. of City of Chicago, 335 Ill.App.3d 948, 956-957, 781 N.E.2d 386 (2002).

Indeed, for the very first time since the initiation of this litigation, Respondent now asserts the justification newly-fabricated by the lower court in concluding that Petitioner was sued merely in its status as a landowner. Respondent never advanced such a position in the trial court or on appeal. In fact, in Respondent's Complaint in the district court, Respondent did not sue Petitioner as a landowner. Rather, Respondent properly pleaded that in mining and removing coal, Petitioner "failed to provide sufficient support for the surface property." ROA 23 par 8.

The District Court found, and even the appellate court recognized, that the mine constituted construction of an improvement, and even that the formation of the support pillars of the mine constituted construction, and their failure was the cause of subsidence. The district court's judgment was correct

and should not have been disturbed, especially in the way the Court of Appeals did here.

CONCLUSION

This Court should grant the Petition and review the case. In the alternative, this Court should affirm the District Court's judgment or grant, vacate and remand for further proceedings.

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